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Constitutional Review: Supreme Court, October 1977 Term

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A. *Punishing Breaches of the Confidentiality of Judicial Review Commissions:* Landmark Communications, Inc. v. Virginia

In *Landmark Communications, Inc. v. Virginia*,[1] the Supreme Court addressed the problem of accommodating a state's legitimate interest in maintaining the confidentiality of proceedings before a state judicial review commission[2] with the First Amendment guarantee that the news media shall be free of restrictions in discussing governmental affairs.[3] The Court held unconstitutional a Virginia statute[4] which made it a misdemeanor for any person to divulge information concerning proceedings before the state's Judicial Inquiry and Review Commission.[5] The Court's decision in *Landmark* serves to underscore the protection afforded the news media by the First Amendment when it engages in the "free discussion of governmental affairs."[6]

1. The Virginia Supreme Court Decision

The facts underlying the *Landmark* litigation are relatively simple.[7] Landmark Communications, Inc., publishes *The Virginian-Pilot*, a general circulation newspaper in the Tidewater area of Virginia. On October 4, 1975, the *Pilot* published an article stating in pertinent part that the Judicial Inquiry and Review Commission (hereinafter Commission) had conducted a "formal hearing concerning possible disciplinary action against" a judge in Norfolk, Virginia. The newspaper account included the judge's name, and went on to state that the hear-

1. 435 U.S. 829 (1978).

2. *Id.* at 835. In recognition of this interest, the Court cited W. BRAITHWAITE, WHO JUDGES THE JUDGES 161-62 (1971); Buckley, *The Commission on Judicial Qualifications: An Attempt to Deal with Judicial Misconduct*, 3 U.S.F.L. REV. 244, 255-56 (1969).

3. *See* Mills v. Alabama, 384 U.S. 214 (1966). In *Mills*, the Court upheld the right of a newspaper to publish an election day editorial urging voters to support changing their form of government. The Court noted: "Whatever differences there may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Id.* at 218 (footnote omitted).

4. VA. CODE § 2.1-37.13 (1973).

5. This commission was created pursuant to VA. CONST. art. VI, § 10, which provides, *inter alia*, for the creation of a commission "vested with the power to investigate . . . charges which would be the basis for retirement, censure, or removal of a judge."

6. Mills v. Alabama, 384 U.S. 214, 218 (1966). *See* note 3 *supra*.

7. Except where otherwise noted, this summary of the facts is taken from the opinion of the Virginia Supreme Court. *See* Landmark Communications, Inc. v. Virginia, 217 Va. 699, 701-03, 233 S.E.2d 120, 122-23 (1977).

ing "apparently stemmed from charges of incompetence against the . . . judge." On November 5, 1975, Landmark was indicted for violating Virginia Code section 2.1-37.13, which provides that "[a]ll papers filed with and proceedings before the Commission . . . including the identification of the subject judge . . . shall be confidential and shall not be divulged by any person to anyone except the Commission, except that the record of any proceeding filed with the Supreme Court shall lose its confidential character."[8] The code further provides that "[a]ny person who shall divulge information in violation . . . of this section shall be guilty of a misdemeanor."[9] In the subsequent trial, the Circuit Court of the City of Norfolk found Landmark guilty of violating section 2.1-37.13 and fined the corporation the sum of $500.00.

Landmark appealed its conviction to the Supreme Court of Virginia.[10] Its initial contention was that the statute's proscription against divulging information regarding Commission proceedings was ambiguous in that it failed to indicate whether its sanctions applied only to participants in the proceedings or also to nonparticipating observers such as the news media. Landmark argued that the statute's penal nature required that any such ambiguity be resolved against the Commonwealth and in favor of the alleged violator.[11] The newspaper urged the Virginia court to construe section 2.1-37.13 to mean that a violation would occur only upon "the *first act of disclosure* . . . by an individual who had *actually participated* in some manner in the proceedings of [the] Commission."[12] Under such a construction, Landmark contended, the statute had been violated not by the newspaper but by the Commission participant who first disclosed the confidential information. Landmark's subsequent publication of information "*voluntarily and freely* given to it" was therefore outside the scope of the statute.[13] The major constitutional argument raised by Landmark on appeal was that the imposition of the statute's criminal sanctions "would unconstitutionally abridge its First Amendment guaranty of freedom of the press."[14] Landmark argued that the statute either constituted an impermissible prior restraint[15] or imposed a subsequent

8. VA. CODE § 2.1-37.13 (1973).

9. *Id.*

10. Landmark Communications, Inc. v. Virginia, 217 Va. 699, 233 S.E.2d 120 (1977).

11. *Id.* at 701, 233 S.E.2d at 122.

12. *Id.* at 702, 233 S.E.2d at 122-23 (emphasis in original).

13. *Id.*, 233 S.E.2d at 123 (emphasis in original).

14. *Id.* at 703, 233 S.E.2d at 123.

15. *Id.* at 704, 233 S.E.2d at 124. Landmark based this contention on the decisions of the Supreme Court in New York Times Co. v. United States, 403 U.S. 713 (1971), and Near v. Minnesota, 283 U.S. 697 (1931).

punishment for publication without satisfying the requisite "clear and present danger" elements necessary to impose such punishment.[16]

The Supreme Court of Virginia rejected Landmark's statutory construction argument, holding that the statute was clear and unambiguous in its terms and that its proscription applied to any person (including corporate entities) who divulged information regarding Commission proceedings before a complaint was filed with the state supreme court.[17] Turning to the constitutional claim, the state court disagreed with Landmark's contention that the statute imposed a prior restraint, finding instead that its provisions fit more properly into the subsequent punishment category.[18] This characterization compelled the court to subject the statute to a clear and present danger analysis. The court examined and then distinguished the administration of justice cases cited by Landmark.[19] Whereas those cases involved a court's common law power of contempt, and thus arose from the exercise of judicial power, the Virginia Supreme Court observed that the instant case was based on the violation of a statute designed to protect a legislatively determined state interest.[20] The court asserted that the requirement of confidentiality was essential to preserve the legitimate state interest in maintaining the effectiveness of the Commission and ensuring the orderly administration of justice.[21] The Virginia Supreme Court concluded its opinion by accepting the Commonwealth's position that criminal sanctions are a legitimate and necessary means to protect those state interests and prevent the clear and present danger

16. 217 Va. at 705, 233 S.E.2d at 124. Landmark relied on a line of cases which had applied the "clear and present danger" test in overturning contempt citations based on media criticism of the manner in which courts were handling pending matters. These cases are discussed *infra*: Bridges v. California, 314 U.S. 252 (1941); Pennekamp v. Florida, 328 U.S. 331 (1946); Craig v. Harney, 331 U.S. 367 (1947); Wood v. Georgia, 370 U.S. 375 (1962). While the contempt citations stemmed from a perceived threat to "the orderly administration of justice," the Supreme Court held in each case that expression critical of a court or its operations is protected by the First Amendment unless it poses a clear and present danger to the system. *See generally* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 449-59 (1970); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 623-31 (5th ed. 1978).

17. 217 Va. at 702-03, 233 S.E.2d at 123.

18. *Id.* at 704, 233 S.E.2d at 124.

19. *See* note 16 *supra*.

20. 217 Va. at 707-08, 233 S.E.2d at 126-27.

21. *Id.* at 712-13, 233 S.E.2d at 129. The court pointed out that the requirement of confidentiality provides the following benefits: "(1) protects the reputation of an individual judge by shielding him from publicity involving frivolous complaints, (2) protects public confidence in the judicial system by preventing disclosure of a complaint against a judge until the Commission has determined the charge is well-founded, and (3) protects complainants and witnesses from possible recrimination by prohibiting disclosure of their identity prior to a determination that the complaint is meritorious." *Id.* at 712, 233 S.E.2d at 128-29.

which would result from premature disclosure of the Commission's proceedings.[22]

2. The United States Supreme Court Decision

On appeal, the Supreme Court reversed.[23] Chief Justice Burger, writing for the six-member majority,[24] disagreed with the Virginia Supreme Court's conclusion that a clear and present danger to the administration of justice justified the curtailment of speech by criminal sanctions.[25] He noted that some form of confidential judicial inquiry and disciplinary procedure exists in virtually every state.[26] The "substantial uniformity" of these plans suggested that "confidentiality is perceived as tending to insure the ultimate effectiveness of the judicial review commissions."[27] But Landmark did not challenge the need for confidentiality in proceedings to review the conduct and integrity of judicial officers. Rather, it claimed only that confidentiality could not be preserved by the imposition of criminal sanctions on third parties not involved in the proceedings themselves, an approach that only one other state besides Virginia had found necessary to adopt.[28]

In view of the foregoing, the Chief Justice formulated the issue in *Landmark* as follows: "The narrow and limited question presented, then, is whether the First Amendment permits the criminal punishment

22. *Id.* at 712-13, 233 S.E.2d at 129.

23. Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978).

24. Chief Justice Burger was joined by Justices White, Marshall, Blackmun, Rehnquist and Stevens. Justice Stewart filed an opinion concurring in the judgment. Justices Brennan and Powell took no part in the consideration or decision of the case.

25. 435 U.S. at 845.

26. *Id.* at 834. The Chief Justice pointed out that 47 states, the District of Columbia and Puerto Rico have such judicial inquiry and disciplinary procedures. All of these jurisdictions except Puerto Rico require confidentiality in the early stages of the proceedings. A list of the states and their relevant constitutional and statutory provisions was attached as an appendix to the opinion. *Id.* app., at 846-48.

27. *Id.* at 835. Chief Justice Burger summarized the interests said to be served by the requirement of confidentiality as follows: "First, confidentiality is thought to encourage the filing of complaints and the willing participation of relevant witnesses by providing protection against possible retaliation or recrimination. Second, at least until the time when the meritorious can be separated from the frivolous complaints, the confidentiality of the proceedings protects judges from the injury which might result from publication of unexamined and unwarranted complaints. And finally, it is argued, confidence in the judiciary as an institution is maintained by avoiding premature announcement of groundless claims of judicial misconduct or disability since it can be assumed that some frivolous complaints will be made against judicial officers who rarely can satisfy all contending litigants." *Id.* (footnote omitted). *See* note 2 *supra*. Confidentiality is also thought to facilitate the removal or retirement of judges without a formal proceeding with its attendant publicity, and to permit a judge to be made aware of valid complaints. 435 U.S. at 835-36.

28. *Id.* at 836-37.

of third persons who are strangers to the inquiry, including the news media, for divulging or publishing truthful information regarding confidential proceedings of the Judicial Inquiry and Review Commission."[29] Before examining this issue in light of the facts of the case, the Court considered Landmark's contention that recent decisions regarding the truthful and even untruthful reporting about public officials[30] and the dissemination of accurate commercial information[31] should be dispositive of the question presented. Holding that the speech in question "lies near the core of the First Amendment,"[32] the Court rejected the need to rely on the more tangential First Amendment values implicated in the context of libel or commercial speech. As Chief Justice Burger observed: "The operations of the courts and the judicial conduct of judges are matters of utmost public concern."[33]

The operation of the Commission was deemed such a matter of public interest, and Landmark's article of October 4 was found to have provided accurate factual information about its proceedings.[34] In the Court's view, this reporting "clearly served those interests in public scrutiny and discussion of governmental affairs which the First Amendment was adopted to protect."[35]

The Court responded to the Commonwealth's argument that the First Amendment does not protect the publication of information "which by Constitutional mandate is to be confidential."[36] The state had relied on *Cox Broadcasting Corp. v. Cohn*[37] in support of this position. In *Cox* the Court held that the First and Fourteenth Amend-

29. *Id.* at 837 (footnote omitted). In an accompanying footnote, the Court explained that while the statute in question might have been construed by the Virginia Supreme Court so as to apply only to participants to the proceedings and not to third parties, the broad construction given the statute by the lower court precluded a narrow reading by the Supreme Court since " 'it is not our function to construe a state statute contrary to the construction given it by the highest court of a State.' " *Id.* at 837 n.9 (quoting O'Brien v. Skinner, 414 U.S. 524, 531 (1974)).

30. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

31. Linmark Assoc., Inc. v. Township of Willingboro, 431 U.S. 85 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

32. 435 U.S. at 838 (citing Buckley v. Valeo, 424 U.S. 1, 64-65 (1976)).

33. 435 U.S. at 839. *See, e.g.*, Sheppard v. Maxwell, 384 U.S. 333, 350 (1966); Bridges v. California, 314 U.S. 252, 289 (1941) (Frankfurter, J., dissenting). *Cf.* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 492 (1975) ("With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice.").

34. 435 U.S. at 839.

35. *Id.* (citing New York Times Co. v. Sullivan, 376 U.S. 254, 269-70 (1964)).

36. 435 U.S. at 840 (quoting Brief for Appellee at 17). VA. CONST. art. VI, § 10, provides, *inter alia*, that "[p]roceedings before the Commission shall be confidential."

37. 420 U.S. 469 (1975).

ments shielded a newspaper from liability for invasion of privacy based on the accurate reporting of the name of a deceased rape victim.[38] Crucial to the decision in *Cox* was the fact that the name of the victim had been revealed in a public proceeding.[39] Moreover, the Court in *Cox* specifically reserved the question of the scope of First Amendment protection where, as in *Landmark*, public records are not involved.[40] Because *Cox* did not answer the question presented, the *Landmark* Court undertook an inquiry to determine whether Landmark's actions were protected by the First Amendment.

The Court examined the interests which the Commonwealth claimed were protected by the statute.[41] The Court was willing to assume that confidentiality serves legitimate state interests, but nevertheless concluded that this did not justify the imposition of criminal sanctions on third parties to the proceedings such as Landmark.[42] Chief Justice Burger noted that the Commonwealth had provided no factual basis to demonstrate the necessity for criminal proscriptions and emphasized that most states had not adopted such an approach.[43] Injury to official reputation does not constitute a sufficient justification for punishing otherwise protected speech.[44] Consequently, the reputation of the courts as an institution merits no greater protection.[45] Support for these conclusions was found in Justice Black's observation in *Bridges v. California*:[46]

> The assumption that respect for the judiciary can be won by shielding judges from public criticism wrongly appraises the character of American political opinion. . . . [A]n enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.[47]

Since the Commonwealth had not justified the burden its statutory scheme placed on protected speech, the Supreme Court reversed

38. *Id.* at 495.
39. *Id.* at 496-97.
40. *Id.* at 497 n.27.
41. Criminal sanctions were said to be necessary to prevent the public discussion of unfounded allegations of judicial misconduct and the premature disclosure of the details of proceedings before the Commission. *See* 435 U.S. at 840. *See also* note 27 *supra*.
42. 435 U.S. at 841.
43. *Id.* & n.12.
44. *Id.* at 841-42 (citing New York Times Co. v. Sullivan, 376 U.S. 254, 272-73 (1964)).
45. 435 U.S. at 842.
46. 314 U.S. 252 (1941).
47. *Id.* at 270-71. *See also id.* at 291-92 (Frankfurter, J., dissenting).

Landmark's conviction.[48]

In the final section of the *Landmark* opinion, the Court criticized the Virginia Supreme Court's reliance upon and mechanical application of the clear and present danger test.[49] A legislatively determined state interest was viewed as an insufficient basis for a judicial finding of a clear and present danger.[50] In the words of Chief Justice Burger: "Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake."[51] The Court disapproved of the Virginia court's attempt to distinguish *Landmark* from prior cases which had rejected findings of clear and present danger arising from out-of-court media commentaries.[52] If anything, the Court noted, the threat to the administration of justice posed in those cases was more direct and substantial than that presented by *Landmark's* disclosure.[53] Referring to the availability of contempt powers to punish breaches of confidentiality by commission members and staff, as well as to oaths of secrecy sometimes required of commission members, staff and witnesses, the Court concluded that "much of the risk [to the administration of justice] can be eliminated through careful internal procedures to protect the confidentiality of Commission proceedings."[54] Despite the availability of alternative measures for protecting the state's interest in confidentiality, the Court found that the "danger" embodied in Landmark's publication " 'is precisely one of the types of activity envisioned by the Founders in presenting the First Amendment for

48. 435 U.S. at 842, 845-46.

49. *Id.* at 842-43: "Mr. Justice Holmes' test was never intended 'to express a technical legal doctrine or to convey a formula for adjudicating cases.' Pennekamp v. Florida, 328 U.S. 331, 353 (1946) (Frankfurter, J., concurring). Properly applied, the test requires a court to make its own inquiry into the imminence and magnitude of the danger said to flow from the particular utterance and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression. The possibility that other measures will serve the State's interests should also be weighed."

50. *Id.* at 844. *See also* Justice Poff's dissent from the Virginia Supreme Court's decision, 217 Va. 699, 713, 233 S.E.2d 120, 129 (1977) (Poff, J., dissenting) "Just as a court cannot infer the existence of a clear and present danger from allegations made in a contempt citation and adopt that inference as a conclusion of law, Wood v. Georgia, 370 U.S. 375 (1962), a court cannot infer the existence of a clear and present danger from the mere enactment of a penal statute." *Id.*

51. 435 U.S. at 843. In support of the need for an independent judicial inquiry into the existence of a clear and present danger, the Chief Justice quoted from Pennekamp v. Florida, 328 U.S. 331, 335 (1946) and Whitney v. California, 274 U.S. 357, 378-79 (1927) (Brandeis, J., concurring). *See* 435 U.S. at 843-44.

52. *See* notes 16 & 17 and accompanying text *supra.*

53. 435 U.S. at 845.

54. *Id.* (citing 435 U.S. at 841 n.12).

ratification.' "[55]

Justice Stewart concurred in the Court's judgment but could not agree that section 2.1-37.13 was unconstitutional.[56] In his view, "[t]here could hardly be a higher governmental interest than a State's interest in the quality of its judiciary."[57] Based on this paramount concern, Justice Stewart recognized the legitimate "derivative interest" in maintaining the confidentiality of Commission proceedings.[58] Thus, the state could constitutionally punish any individual who breached this confidentiality.[59] However, rather than attempting to enforce criminal sanctions against an individual, Virginia sought to punish a newspaper for its publication of the information. This application of the statute to the press was deemed unconstitutional: "If the constitutional protection of a free press means anything, it means that government cannot take it upon itself to decide what a newspaper may and may not publish."[60]

3. Analysis

Analysis of the questions raised and resolved in *Landmark* can best be accomplished by focusing on two aspects of the case. The first section that follows will discuss the extent to which *Landmark* is consistent with the "clear and present danger" cases relied upon by the Virginia Supreme Court. The second section will examine the utility of applying the clear and present danger test in future media cases.

a. Background of the Clear and Present Danger Standard

The decisions of the United States Supreme Court in *Bridges v. California*,[61] *Pennekamp v. Florida*,[62] *Craig v. Harney*[63] and *Wood v.*

55. *Id.* at 845 (quoting Wood v. Georgia, 370 U.S. 375, 388 (1962)).
56. 435 U.S. at 848 (Stewart, J., concurring in the judgment).
57. *Id.*
58. *Id.*
59. *Id.* at 849. Because Justice Stewart refused to join the majority opinion, his concurrence must be taken as an endorsement of the state's right to punish *any* nonmedia individual or entity who divulges information concerning Commission proceedings. The majority declined to address the question of the possibility of imposing criminal sanctions on persons who actually participated in the proceedings. *See id.* at 837 & n.9. Indeed, the Court even suggested that such punishment would be constitutional. *See id.* at 841 n.12. But the majority did not limit its holding to the protection of the news media; any third person who was a stranger to the proceedings is within the Court's decision. *See id.* at 837. Justice Stewart apparently wrote separately to emphasize his belief that First Amendment protections for the disclosure of confidential information should be extended only to members of the press.
60. *Id.* at 849 (Stewart, J., concurring in the judgment).
61. 314 U.S. 252 (1941).
62. 328 U.S. 331 (1946).
63. 331 U.S. 367 (1947).

Georgia[64] constitute the "clear and present danger" cases upon which the Virginia Supreme Court relied in affirming Landmark's conviction.[65] Each of these cases involved a lower court's use of the common law power of contempt to punish out-of-court statements concerning pending cases or investigations. Such statements, in the view of the courts, created a clear and present danger to the orderly administration of justice.

Writing for the Court in *Bridges*, Justice Black reversed a decision of the California Supreme Court[66] which upheld a ruling that the *Los Angeles Times* had been in contempt of court when it published an editorial urging a judge to imprison two criminal defendants then on trial. Justice Black began his analysis by noting that there had been no legislative determination that such out-of-court commentary posed a danger justifying punishment.[67] Thus, the decision by the California Supreme Court did not come up for review "encased in the armor wrought by prior legislative deliberation."[68] Relying on language from *Cantwell v. Connecticut*,[69] Justice Black noted that had there been an indication of legislative intent, such a " 'declaration of the State's policy would weigh heavily in any challenge of the law as infringing constitutional limitations.' "[70] In the absence of such a legislative declaration, the Court in *Bridges* was reluctant to rely on the California courts' determinations that the editorials at issue had either an "inherent" or "reasonable" tendency to interfere with the orderly administration of justice.[71] Unfortunately, the Court failed to set forth with any specificity precisely what type of speech would be punishable under a clear and present danger analysis. Instead, Justice Black provided the following summary: "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."[72]

Five years later, in delivering the opinion of the Court in *Penne-*

64. 370 U.S. 375 (1962).

65. *See* Landmark Communications, Inc. v. Virginia, 217 Va. at 706-13, 233 S.E.2d at 125-29.

66. Bridges v. Superior Court, 14 Cal. 2d 464, 94 P.2d 983 (1939). *Compare* Times Mirror v. Superior Court, 15 Cal. 2d 99, 98 P.2d 1029 (1940).

67. 314 U.S. at 260.

68. *Id.* at 261.

69. 310 U.S. 296 (1940) (absence of a state policy restricting street discussion of religious affairs weighed heavily in reversal of defendant's conviction).

70. 314 U.S. at 260 (quoting Cantwell v. Connecticut, 310 U.S. 296, 307-08 (1940)).

71. 314 U.S. at 272-73.

72. *Id.* at 263.

kamp v. Florida,[73] Justice Reed recognized the vagueness of the *Bridges* standard and reiterated the Court's belief that clarity and definiteness would somehow emerge in subsequent cases.[74] The *Pennekamp* decision did not fulfill this expectation, however, only adding to the *Bridges* standard the requirement of "a solidarity of evidence."[75] The *Pennekamp* Court's major contribution to the clear and present danger test was not this addition to the guidelines but rather the instructions on how the required evidence is to be obtained. The *Pennekamp* Court noted that it was "compelled to examine for [itself] the statements in issue and the circumstances under which they were made to see whether or not they do carry a threat of clear and present danger. . . ."[76] The Virginia Supreme Court's failure to carry out this investigative process was a major factor underlying the Supreme Court's rejection of its analysis in *Landmark*. The Virginia court's reliance solely on the legislative determination was deemed insufficient,[77] and Chief Justice Burger reiterated the importance of undertaking an independent judicial investigation.[78] He concluded by asserting that if the Virginia court had undertaken such an inquiry it would have realized that Landmark's article did not present a clear and present danger to the administration of justice.[79]

Applying the guidelines established in *Bridges* and *Pennekamp* to the Court's decision in *Landmark*,[80] it appears that the latter decision is

73. 328 U.S. 331 (1946).

74. *Id.* at 334.

75. *Id.* at 347. The only other suggestion of a guideline for determining the existence of a clear and present danger appears in Justice Frankfurter's concurring opinion: "It is the focused attempt to influence a particular decision that may have a corroding effect on the process of justice, and it is such comment that justifies the corrective process." *Id.* at 366 (Frankfurter, J., concurring). Yet even this statement provides little guidance since the nature and extent of the "focused attempt" were not defined.

76. *Id.* at 335.

77. 435 U.S. at 844. The Court stated: "It was . . . incumbent upon the Supreme Court of Virginia to go behind the legislative determination and examine for itself 'the particular utteranc[e] here in question and the circumstances of [its] publication to determine to what extent the substantive evil of unfair administration of justice was a likely consequence, and whether the degree of likelihood was sufficient to justify [subsequent] punishment.'" *Id.* (quoting Bridges v. California, 314 U.S. 252, 271 (1941)).

78. 435 U.S. at 844: "A legislature appropriately inquires into and may declare the reasons impelling legislative action but the judicial function commands analysis of whether the specific conduct charged falls within the reach of the statute and if so whether the legislation is consonant with the Constitution."

79. *Id.* at 844-45. *See* note 90 *infra*.

80. *Bridges* and *Pennekamp* having established the basic, albeit vague, guidelines for applying the clear and present danger test, the primary significance of the two subsequent press cases, Craig v. Harney, 331 U.S. 367 (1947), and Wood v. Georgia, 370 U.S. 375 (1962), is their reaffirmation of the requirement of an independent judicial investigation of

consistent with its predecessors insofar as it represents the continuation of the Court's policy of reversing the use by lower courts of the contempt power to restrain out-of-court commentary by the media concerning pending proceedings or investigations. Where the *Landmark* decision appears to break with precedent is in the Court's suggestion that the clear and present danger test is not applicable to cases like *Landmark*,[81] a suggestion whose effect would be virtually to eliminate the test from the active lexicon of constitutional adjudication.

b. The Future of the Clear and Present Danger Test

(1) The Question of Relevancy

The *Landmark* decision significantly diminishes the usefulness of the clear and present danger standard in contempt of court prosecutions of the news media. By questioning whether the test was relevant to the situation presented in *Landmark*,[82] the Court may have eliminated the last area in which it had been actively applied—the administration of justice cases.[83]

The Court began its discussion of the applicability of the standard by noting that the Virginia Supreme Court had relied on the test in rejecting Landmark's constitutional challenge to its conviction.[84] Disapproving this reliance, the Court criticized the use of the clear and present danger test in *Landmark* on two grounds: it questioned the relevancy of the test to the *Landmark* situation, and particularly rejected what it termed the "mechanical application" of the test by the state court.[85] Although the Court did not set forth specific support for its contention that the test was not relevant to the question presented in

the alleged threat to the administration of justice. The only additional guidelines these cases provided were as follows: 1) The Court in *Craig* asserted that the danger "must not be remote or even probable; it must immediately imperil." 331 U.S. at 376. *Craig* also indicated that publications which were merely in bad taste could not be considered dangerous. *Id.* at 377. 2) In *Wood*, the Court overturned a contempt citation for criticizing the charging of a grand jury and interfering with its investigation. Relying on the *Bridges-Pennekamp* standard, the Court based its reversal on the failure of the lower court to adduce evidence demonstrating an actual interference with justice, 370 U.S. at 386-88, and the failure to adhere to legislative limitations on the use of the contempt power. *Id.* at 385-86 & n.10. In making this latter ground an explicit basis for its decision, *see id.*, the Court reaffirmed the prior legislative deliberation doctrine of *Bridges*. *See* notes 67-68 and accompanying text *supra*.

81. *See* notes 49-55 and accompanying text *supra*.

82. 435 U.S. at 842.

83. T. EMERSON, *supra* note 16, at 456.

84. 435 U.S. at 842.

85. *Id.* Quoting from Pennekamp v. Florida, 328 U.S. 331, 353 (1946) (Frankfurter, J., concurring), the *Landmark* Court noted that the test had never been intended to provide a

Landmark, it substantiated this view by measuring the evidence presented by the Commonwealth of Virginia against the requirements established in *Bridges* and *Pennekamp*.[86] The Supreme Court of Virginia had conceded that the record was devoid of actual facts demonstrating a clear and present danger to the administration of justice.[87] It nonetheless held that the legislative declaration that such a danger would exist, coupled with the stipulated fact that Landmark published the article, was sufficient to warrant the imposition of a criminal sanction.[88] The propriety of the Virginia court's reliance on this legislative determination was emphatically rejected by the Supreme Court: "Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake."[89] In Chief Justice Burger's view, if the Supreme Court of Virginia had looked behind the legislative declaration and examined the particular facts surrounding the speech at issue, it would not have found any threat to the administration of justice sufficiently serious to justify the imposition of criminal sanctions.[90] Thus, the absence of an adequate factual basis for Landmark's conviction seems to have been one ground for the Court's view that the clear and present danger test was inapplicable in that context.[91]

A second basis for regarding this test as unnecessary to the disposition of *Landmark* is the Court's characterization of the speech at issue as lying "near the core of the First Amendment."[92] Citing as an example its ruling in *Buckley v. Valeo*,[93] the Court concluded that the Commonwealth's asserted interests were insufficient to justify the encroachment on freedom of speech and of the press that follow from the imposition of criminal sanctions.[94] The Court's subsequent analy-

formula or technical legal doctrine for adjudicating free speech cases. 435 U.S. at 842. *See* note 49 *supra*.

86. *See* notes 66-76 and accompanying text *supra*.

87. 217 Va. at 707, 233 S.E.2d at 126.

88. *Id.* at 708-09, 233 S.E.2d at 126-27.

89. 435 U.S. at 843. *See* note 51 *supra*.

90. 435 U.S. at 844-45. The Court noted that the threat to the administration of justice posed in *Landmark* was less direct and substantial than that claimed to arise in *Bridges, Pennekamp, Craig* and *Wood*. It concluded that if the requirements of the clear and present danger test could not be satisfied in those cases, they could not be met in *Landmark*. *Id.* at 845.

91. The decision in *Landmark* brings the Court closer to acceptance of the "full protection rule." As discussed by T. EMERSON, *supra* note 16, at 457: "Under that doctrine a communication critical of the court could be punished or suppressed only if it amounted to 'action' rather than 'expression.'" The author suggests that threats of physical violence or an employer's threats to employees would be examples of such "action."

92. 435 U.S. at 838.

93. 424 U.S. 1 (1976).

94. 435 U.S. at 838. In *Buckley*, the Court rejected a challenge to the constitutionality

sis focused on the public interest in the operation of the Judicial Inquiry and Review Commission. Landmark's article was found to have accurately reported on its proceedings, a function which promoted values central to the First Amendment.[95] The Court relied on its prior decisions which had underscored the amenability of judges and the judiciary to criticism voiced in the press.[96] The subsequent discussion of the clear and present danger test was therefore a response to the Virginia Supreme Court's analysis rather than a basis for the decision in *Landmark*.

(2) The Alternative Means Analysis

As noted earlier,[97] the administration of justice cases constitute one of the last areas in which the Court, prior to *Landmark*, had utilized the clear and present danger test. One factor the Court apparently considered in striking down the criminal conviction in *Landmark* was that the Virginia statute, with its imposition of criminal sanctions, was out of step with the laws of over forty states, none of which "found it necessary to enforce confidentiality by use of criminal sanctions against nonparticipants."[98] The Court noted that these other states only punish breaches of confidentiality by commission members and staff, and that such breaches are punishable as civil contempt rather than criminal violations.[99] The Court also noted that some states require witnesses as well as staff and commission members to take an oath of secrecy. A violation of this requirement is similarly treated as contempt.[100] While the Court did not consider these sister state approaches to ensuring confidentiality dispositive of the issue before it,[101]

of the disclosure provisions of the Federal Election Campaign Act of 1971. Responding to the argument that compelled disclosure of the identity of campaign contributors infringed the right of associational privacy, the Court conceded that a "mere showing of some legitimate governmental interest" would be insufficient to justify such an encroachment upon First Amendment values. The appropriate analysis, the Court held, involves strict scrutiny of the asserted state interests to determine whether there is a "relevant correlation" or "substantial relation" between the governmental interest and the information to be disclosed. 424 U.S. at 64.

95. 435 U.S. at 839 (citing New York Times Co. v. Sullivan, 376 U.S. 254, 269-70 (1964)).

96. Sheppard v. Maxwell, 384 U.S. 333, 350 (1966); New York Times Co. v. Sullivan, 376 U.S. 254, 272-73 (1964); Bridges v. California, 314 U.S. 252, 270-71 (1941); *id.* at 289, 291-92 (Frankfurter, J., dissenting). *See also* Mills v. Alabama, 384 U.S. 214, 218 (1966).

97. *See* text accompanying note 83 *supra*.

98. 435 U.S. at 841 (footnote omitted).

99. *Id.* at 841 n.12.

100. *Id.*

101. *Id.* at 841.

it seems reasonable to assume that the existence and widespread use of non-criminal alternative means for protecting the asserted state interests was a significant factor in the Court's resolution of *Landmark*.[102] The widespread use of civil contempt sanctions and other non-criminal approaches to ensuring confidentiality points to another reason for the inapplicability of the clear and present danger test in situations such as that presented in *Landmark*. Legislatures are now cognizant of the fact that when the news media criticizes the functioning of the judiciary, courts should hold such criticism fully protected by the First Amendment unless it goes so far as to amount to "action" instead of expression.[103] Consequently, most state legislatures now protect the confidentiality of their judicial review commission proceedings through non-criminal sanctions aimed primarily at participants.[104] The effect of this trend is to limit the use of the clear and present danger test to those rare situations in which the speech at issue creates an imminent danger of harm.[105]

c. The Publication of Legally Confidential Information

One further aspect of the *Landmark* decision merits discussion in this review, although it is not related to the clear and present danger analysis previously discussed. The Commonwealth had argued in *Landmark* that the First Amendment right of a free press to report on and criticize judicial conduct did not extend to the publication of information " 'which by Constitutional mandate is to be confidential.' "[106] The Commonwealth relied on the Court's decision in *Cox Broadcasting Corp. v. Cohn*[107] to support this contention. In *Cox* the Court held that

102. The Court noted that its prior decisions had struck down the suppression of speech claimed necessary by a state to protect the reputations of its judges or to maintain the institutional integrity of its courts. *Id.* at 841-42 (citing New York Times Co. v. Sullivan, 376 U.S. 254, 272-73 (1964); Bridges v. California, 314 U.S. 252, 270-71 (1941)). These principles were deemed controlling and dispositive of the criminal punishment issue in *Landmark*. 435 U.S. at 842.

103. *See* note 91 *supra*.

104. The Court did not indicate whether it would consider these non-criminal approaches constitutionally valid in a fact situation similar to that presented in *Landmark*. The Court pointed out that the scope of other states' non-criminal sanctions is limited by their application solely to participants to the proceedings, as opposed to the Virginia statute's broad prohibition against disclosure by "any person." 435 U.S. at 841 & n.12. Thus it remains possible that a legislative enactment prohibiting the disclosure of confidential information by a non-participant (*i.e.*, a newspaper) might be found unconstitutional by the Court irrespective of the nature of the punishment imposed.

105. *See* note 91 *supra*.

106. 435 U.S. at 840 (citing Brief for Appellee at 17).

107. 420 U.S. 469 (1975).

a civil action would not lie against a television station for invasion of privacy based on the broadcast of the name of a deceased rape victim obtained from public records.[108] The *Landmark* Court rejected the Commonwealth's reliance on *Cox* since that decision had explicitly reserved the broader question of "whether the publication of truthful information withheld by law from the public domain is similarly privileged."[109] The Court in *Landmark* also refused to deal fully with the question left open in *Cox*. Noting its belief that *Cox* did not provide a dispositive answer to the question presented in *Landmark*, the Court concluded: "We need not address all the implications of that question here, but only whether in the circumstances of this case Landmark's publication is protected by the First Amendment."[110] Since the Court proceeded to hold that the publication could not be criminally punished,[111] it can be inferred that the Court answered the *Cox* question in the affirmative. In the wake of *Landmark*, newspapers would appear to be free to publish truthful information withheld from the public domain, insofar as that information pertains to judicial review commission proceedings in which the newspaper is not a participant. A more general grant of privilege cannot fairly be inferred from *Landmark* given the intent of the Court to limit their resolution of the *Cox* question to the facts in *Landmark*.

B. Searches of Newspaper Offices: Zurcher v. Stanford Daily

In *Zurcher v. Stanford Daily*,[112] the Supreme Court addressed a controversy regarding a different facet of the non-participant observer role of the news media than was confronted in the *Landmark*[113] case. The issue in *Zurcher* was how the terms of the Fourth Amendment,[114] applicable to the states under the Fourteenth Amendment,[115] should be construed in the context of a third-party search[116] of a newspaper of-

108. *See* notes 38-39 and accompanying text *supra*.

109. 435 U.S. at 840 (citing Cox Broadcasting Corp. v. Cohn, 420 U.S. at 497 n.27). *See* note 40 and accompanying text *supra*.

110. 435 U.S. at 840.

111. *Id.* at 841-42.

112. 436 U.S. 547 (1978).

113. Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978). For a discussion of *Landmark, see* notes 1-111 and accompanying text *supra*.

114. U.S. CONST. amend. IV. The Fourth Amendment provides that: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

115. Wolf v. Colorado, 338 U.S. 25 (1949).

116. The Supreme Court characterized a third-party search as "the recurring situation

fice. The object of the search in *Zurcher* was evidence pertaining to criminal activity which a member of the newspaper staff may have photographed and written about, but in which he did not participate. The crucial question in the case was procedural: whether such evidence can properly be obtained by means of a search warrant or whether its production must be compelled by service of a subpoena duces tecum.

A federal district court ruled that the First Amendment protects newspapers from being subjected to searches pursuant to a warrant, except where a clear showing could be made that upon service of a subpoena the evidence sought would be removed from the jurisdiction or destroyed, notwithstanding the issuance of a restraining order in conjunction with the subpoena.[117] The Court of Appeals for the Ninth Circuit affirmed *per curiam*, adopting the opinion of the district court.[118] The Supreme Court granted certiorari[119] and subsequently reversed the lower court decisions.

1. The Decision

The fact situation underlying the *Zurcher* litigation is uncomplicated.[120] On Friday, April 9, 1971, demonstrators then occupying the administrative offices of the Stanford University Hospital engaged in a violent altercation with nine police officers in a hallway of the occupied building. The officers were part of a joint force comprised of officers from the Santa Clara County Sheriff's and Palo Alto Police Departments, who had been called to the scene by the hospital director to oust the demonstrators. The latter had barricaded the doors to both ends of a hallway next to the administrative offices. After peaceful means failed to persuade the demonstrators to leave, the police forced their way in through the west end of the hallway. Simultaneously, the demonstrators, armed with sticks and clubs, burst through the east end of the hallway, attacking and injuring the nine officers stationed there. Since the police photographer and most other bystanders had congregated at the west end of the hall, few of the assailants were identified;

where state authorities have probable cause to believe that fruits, instrumentalities, or other evidence of crime is located on identified property but do not then have probable cause to believe that the owner or possessor of the property is himself implicated in the crime that has occurred or is occurring." 436 U.S. at 553.

117. Stanford Daily v. Zurcher, 353 F. Supp. 124 (N.D. Cal. 1972), *aff'd*, 550 F.2d 464 (9th Cir. 1977), *rev'd*, 436 U.S. 547 (1978).

118. 550 F.2d 464 (9th Cir. 1977), *rev'd*, 436 U.S. 547 (1978).

119. 434 U.S. 816 (1977).

120. The summary of the facts of the case is taken from the Supreme Court opinion. 436 U.S. at 550-52.

however, the officers did see someone photographing the fight from the east end of the hall.

In a special edition published the following Sunday, the *Stanford Daily*, the student newspaper of Stanford University, carried articles and photographs concerning the hospital demonstration and the hallway incident. The photographs carried the byline of a *Daily* staff member and indicated that he had been present at the east end of the hallway, giving rise to the inference that he might have photographed the assault on the nine officers. Accordingly, on the following day the Santa Clara County District Attorney's Office requested a warrant from the municipal court authorizing an immediate search of the *Daily*'s offices for any evidence the newspaper may have obtained regarding the hospital fight. The warrant was issued based on the municipal court's findings of " 'just, probable and reasonable cause for believing that: Negatives and photographs and films, evidence material and relevant to the identity of the perpetrators of felonies, to wit, Battery on a Peace Officer, and Assault with a Deadly Weapon, will be located [on the premises of the Daily].' "[121] The affidavit supporting the request for the search warrant did not link any *Daily* staff members with the unlawful activity.

Later that same day four policemen searched the *Daily*'s offices, accompanied by several *Daily* staff members. The officers inspected photographic laboratories, filing cabinets, desks and wastepaper baskets; locked rooms and drawers were not searched. The search yielded only those photographs which had already been published; no new evidence was discovered. Approximately one month later, the *Daily* and members of its staff instituted a civil action in federal court seeking declaratory and injunctive relief against all law enforcement agents responsible for the issuance and execution of the warrant.[122] The complaint alleged that the search of the *Daily*'s offices under color of law had denied the newspaper and its staff of rights guaranteed to them by the First, Fourth and Fourteenth Amendments to the United States Constitution.

The district court refused to issue an injunction but did grant the

121. 436 U.S. at 551 (quoting language from the search warrant, app. 31-32, issued Apr. 12, 1971, Santa Clara County Municipal Court).

122. The action was brought pursuant to 42 U.S.C. § 1983 (1976), which provides that, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Daily's request for declaratory relief.[123] Although acknowledging the existence of probable cause to believe that relevant evidence regarding the criminal activity would be found in the *Daily*'s office, the court nonetheless held that under the circumstances a search warrant was a constitutionally impermissible means of obtaining such evidence.[124] Rather, the use of a subpoena duces tecum, unless made impracticable by the circumstances, was regarded by the district court as the appropriate procedure for third-party searches where the possessor of the evidence is not suspected of any crime.[125]

First Amendment considerations played a significant role in the district court decision. The defendants' contention that newspapers, reporters and photographers have no greater Fourth Amendment protections than other citizens was held to be without merit.[126] Judge Peckham reasoned that "[t]he First Amendment is *not* superfluous. Numerous cases have held that the First Amendment 'modifies' the Fourth Amendment to the extent that extra protections may be required when First Amendment interests are involved."[127] The court examined the threats to freedom of the press said to arise more readily from the use of a search warrant than from employing a subpoena: 1) police officers executing such warrants would, owing to the generally disorganized nature of newspaper offices, have the opportunity to rummage through drawers and cabinets, thus endangering confidential materials and relationships;[128] 2) unlike a subpoena duces tecum, search warrants are issued and executed *ex parte*, which deprives the newspaper and its staff of the protections afforded by "judicial control";[129] and 3) police searches might also jeopardize the newspaper's

123. 353 F. Supp. at 136.

124. *Id.* at 127.

125. *Id.* The court noted that impracticability could be established by a showing that the materials sought would be destroyed or removed from the jurisdiction despite a restraining order. *Id.* at 133.

126. *Id.* at 134.

127. *Id.* (emphasis in the original) (citing A Quantity of Books v. Kansas, 378 U.S. 205 (1964) (seizure of allegedly obscene books); Marcus v. Search Warrant, 367 U.S. 717 (1961) (seizure of allegedly obscene magazines); NAACP v. Alabama, 357 U.S. 449 (1958) (seizure of organization's membership lists); Demich, Inc. v. Ferdon, 426 F.2d 643 (9th Cir. 1960) (seizure of allegedly obscene motion picture film), *vacated and remanded on other grounds*, 401 U.S. 990 (1971); Bethview Amusement Corp. v. Cahn, 416 F.2d 410 (2nd Cir. 1969), *cert. denied*, 397 U.S. 920 (1970) (seizure of allegedly obscene motion picture film)). None of these cases dealt specifically with warrantless searches of newspaper offices.

128. 353 F. Supp. at 134-35. Such incursions by law enforcement agencies were thought to have the potential for chilling the exchange of information these confidential relationships foster, ultimately affecting the ability of the press to gather news. *Id.*

129. *Id.* at 135. In support of the need for such "judicial control" over searches of newspapers, the court cited Branzburg v. Hayes, 408 U.S. 665, 708 (majority opinion), 710 (Pow-

credibility and create a risk of self-censorship.[130]

In the view of the district court, a police search of a newspaper office creates an "overwhelming threat" to the proper functioning of the press, especially where less drastic means can be employed to secure the needed information.[131] The court therefore held that third-party searches of newspapers are constitutionally impermissible except where there is a clear showing before a magistrate that the materials sought will be destroyed or removed and that a restraining order would be futile.[132] Since the defendants had not made such a showing, the court declared the search of the *Daily*'s offices to have been unlawful.[133]

On appeal, the United States Supreme Court reversed.[134] Writing for the majority,[135] Justice White characterized the district court decision as placing such a severe burden on the state to justify the use of a search warrant that "the effect of the rule is that fruits, instrumentalities, and evidence of crime may be recovered from third parties only by subpoena, not by search warrant."[136] The Court contrasted this "sweeping revision of the Fourth Amendment" by the district court with the language of the Amendment and its subsequent interpretation in the federal judicial system, concluding that there was no direct authority for the rule propounded by the lower court.[137] Justice White

ell, J., concurring). *Branzburg* involved a newspaper reporter subpoenaed to testify before a grand jury regarding the sources for one of his stories.

130. 353 F. Supp. at 135.

131. *Id.*

132. *Id.* Judge Peckham underscored his concern for First Amendment values by adding: "To stop short of this standard would be to sneer at all the First Amendment has come to represent in our society." *Id.*

133. *Id.* The court also dismissed defendants' contentions that the *Daily* and members of its staff lacked standing to question the legality of the search and that this question was moot. *Id.* at 135-36.

134. Zurcher v. Stanford Daily, 436 U.S. 547 (1978).

135. Justice White was joined by Chief Justice Burger and Justices Blackmun, Powell and Rehnquist. Two dissenting opinions were filed, one by Justice Stewart, who was joined by Justice Marshall, and a second by Justice Stevens. Justice Powell wrote a separate concurring opinion in which he addressed the issues raised in Justice Stewart's dissent. Justice Brennan took no part in the consideration or decision of the case.

136. 436 U.S. at 553.

137. *Id.* at 554: "It is an understatement to say that there is no direct authority in this or any other federal court for the District Court's sweeping revision of the Fourth Amendment." (footnote omitted).

The district court had focused upon the Fourth Amendment rights of third parties, noting that few reported cases touched even generally upon the issue. 353 F. Supp. at 127. The district court was unable to cite any cases dealing specifically with whether or when a subpoena duces tecum should be used in lieu of a search warrant. Observing that the Fourth Amendment rights of third parties had previously been considered only in the context of

began his examination of the prior cases construing and applying the Fourth Amendment by quoting from the Court's recent decision in *Fisher v. United States*.[138] In *Fisher* the Framers' approach to personal privacy was interpreted to mean that "when the State's reason to believe incriminating evidence will be found becomes sufficiently great, the invasion of privacy becomes justified and a warrant to search and seize will issue."[139] Justice White also referred to the Court's decision in *Camara v. Municipal Court*.[140] In *Camara* the question of whether or not an administrative search warrant should issue under the standard of probable cause was said to turn on a balancing of the governmental interest justifying the intrusion against the constitutional standard of reasonableness.[141] Finally, Justice White observed that a recent decision of the Court[142] established that search warrants are not directed at persons but rather at "places" and "things," so that a warrant need not even name the person from whom the property will be seized.[143]

Based on this analysis of Fourth Amendment precedent, the Court

standing to challenge the legality of a search, *see, e.g.*, Alderman v. United States, 394 U.S. 165 (1969), the district court went on to examine state court cases dealing with what it believed to be an analogous situation to that presented in the instant case—the rights of third parties in the face of a warrantless seizure of property by the police. *See* Owens v. Way, 141 Ga. 796, 82 S.E. 132 (1914); Newberry v. Carpenter, 107 Mich. 567, 65 N.W. 530 (1895); Commodity Mfg. Co. v. Moore, 198 N.Y.S. 45 (Sup. Ct. 1923). In *Commodity Mfg.*, the New York Supreme Court came closest to anticipating the district court's position: "No case has been cited where the court has gone so far as to say that property, not an instrument of a crime, but only evidence of its commission, and which was the property of someone besides the defendant, could be seized either under a search warrant or as an incident of an arrest of defendant.

"I can well believe that property used in the commission of a crime, even though belonging to a third party, might properly be seized, and also that property not used in the commission of the crime, but containing evidence of the commission of the crime, might properly be seized, where it is the property of the accused; *but to sanction the seizure of the property of innocent persons, or persons not accused, not used in the commission of the crime, but merely because they contained evidence of the crime, would open the door to grave abuses of invasion of property rights.*" 198 N.Y.S. at 47 (emphasis added).

Justice White rejected as inapposite the district court's reliance upon these cases, as well as its reliance on Bacon v. United States, 449 F.2d 933 (9th Cir. 1971) (a showing of probable cause to believe that a subpoena would be an impracticable alternative is required before a court can issue a warrant for the arrest of a material witness). Zurcher v. Stanford Dailey, 436 U.S. at 554 n.5. For a discussion of the lower court's analysis of the applicability of *Bacon, see* notes 206-10 and accompanying text *infra*.

138. 425 U.S. 391 (1976).

139. *Id.* at 400, *quoted in* 436 U.S. at 554.

140. 387 U.S. 523 (1967).

141. *Id.* at 534-35.

142. United States v. Kahn, 415 U.S. 143 (1974).

143. *See id.* at 155 n.15.

concluded that the state's interest in enforcing its criminal laws and in recovering evidence of violations of those laws is the same regardless of the degree of culpability attributable to the person occupying the premises to be searched or in possession of the evidence to be seized.[144] The Court thus rejected the premise underlying the district court holding, which Justice White found to be "that State entitlement to a search warrant depends on the culpability of the owner or possessor of the place to be searched and on the State's right to arrest him."[145] In support of this rejection of the lower court's position, the Court cited both *Camara* and *See v. City of Seattle*[146] for the proposition that the state need not rely on an individual's culpability as a prerequisite to the issuance of a search warrant. *Camara* and *See* were challenges to convictions for refusal to permit warrantless searches of commercial property.[147] The search in each instance was to have been conducted by representatives of municipal administrative agencies (housing and fire department inspectors), and was intended to ensure compliance with local housing and fire ordinances.[148] Justice White, writing for the majority in both *Camara* and *See*,[149]refused to follow the Court's earlier decision in *Frank v. Maryland*[150] and held that in civil as well as criminal cases, the Fourth Amendment requires that search warrants be issued before officials enter a private citizen's home or business premises.[151] Since the culpability of the individual property holders in *Camara* and *See* was deemed irrelevant to the state's right to conduct searches of their property, the *Zurcher* Court reasoned that culpability on the part of the *Daily* or its staff need not be a consideration in the case before it.[152] Consequently, the Court concluded that, "[t]he criti-

144. Zurcher v. Stanford Daily, 436 U.S. at 555.

145. *Id.*

146. 387 U.S. 541 (1967).

147. Appellant in *Camara* had been charged with violating San Francisco Housing Code § 507 and sought a writ of prohibition against his prosecution in state court. Appellant in *See* was convicted of violating the City of Seattle Fire Code § 8.01.150. These statutes made criminal the refusal to permit an inspection by the housing and fire authorities, respectively.

148. The endorsement of these warrantless searches by the lower courts in each case was based on the United States Supreme Court's decision in Frank v. Maryland, 359 U.S. 360 (1959). The Court in *Frank* had ruled that a search warrant was not a necessary prerequisite to an entry into a citizen's home to investigate sanitary conditions pursuant to a local health ordinance.

149. Justice White was joined in each case by Chief Justice Warren and Justices Black, Douglas, Brennan and Fortas. A dissenting opinion covering both cases was filed by Justice Clark, who was joined by Justices Stewart and Harlan.

150. 359 U.S. 360 (1959). *See* note 148 *supra.*

151. Camara v. Municipal Court, 387 U.S. at 534; See v. City of Seattle, 387 U.S. at 546.

152. 436 U.S. at 555-56. The validity of this reading of *Camara* is questionable in light of the facts underlying that case. The Court's opinion in *Camara* reveals that appellant

cal element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought."[153] In support of this conclusion, Justice White analyzed a prior case[154] which had challenged the right of police officers to search a car and seize contraband therefrom when the occupants were not subject to arrest. The Court there rejected the claim that the right of police to search was dependent on the right to arrest.[155] Justice White combined this rule with more recent interpretations of the Fourth Amendment, as reflected in Rule 41 of the Federal Rules of Criminal Procedure,[156] and found that "it is untenable to conclude that property may not be searched unless its occupant is reasonably suspected of crime and is subject to arrest."[157] In the *Zurcher* Court's opinion, the Fourth Amendment had established the proper balance between privacy interests and public need, and the interpretation of that Amendment postulated by the district court was therefore unnecessary and burdensome.[158]

In the next section of the majority opinion, the Court examined the reasons advanced by the district court in support of its decision. Justice White first questioned whether the lack of culpability on the part of the property owner requires the use of a subpoena rather than a search warrant. He noted that the *Daily* and its staff had conceded that if a third party knows that there is contraband on his premises, he is then sufficiently culpable to justify the issuance of a search warrant.[159] And once an innocent third party is apprised of the existence of such evidence on his property, there is no reason why he should then be

Camara was suspected of using the rear portion of his leasehold as a personal residence in violation of the building's occupancy permit. *See* 387 U.S. at 526. It was with knowledge of this possible violation that the housing inspector confronted appellant and requested permission to inspect the premises. Upon appellant's subsequent refusals to permit entry, he was arrested for violating the municipal housing code. *See* note 147 *supra*. It appears, therefore, that his possible culpability was a factor motivating the request to search the premises. *See* 387 U.S. at 526-27.

153. 436 U.S. at 556 (footnote omitted).

154. Carroll v. United States, 267 U.S. 132 (1925).

155. *Id.* at 158-59.

156. FED. R. CRIM. P. 41. *See* United States v. Ventresca, 380 U.S. 102, 105 n.1 (1965).

157. 436 U.S. at 559. *See* United States v. Manufacturers Nat'l Bank, 536 F.2d 699, 703 (6th Cir. 1976), *cert. denied sub nom.* Wingate v. United States, 429 U.S. 1039 (1977).

158. 436 U.S. at 559. The Court therefore held that, "the courts may not, in the name of Fourth Amendment reasonableness, forbid the States from issuing warrants to search for evidence simply because the owner or possessor of the place to be searched is not then reasonably suspected of criminal involvement." *Id.* at 560.

159. *Id.*

allowed to object to the search, withhold the evidence and insist upon service of a subpoena duces tecum.[160]

The Court also considered the potential impact of a subpoena requirement on the efficiency and success of law enforcement efforts. The Court posited two difficulties such a requirement would bring about and characterized them as creating "[serious] hazards to criminal investigation."[161] The first of these is that the seemingly innocent third party might not actually be blameless and may in fact be connected with or sympathetic to those who are culpable. Arguably such an individual could not be relied upon to retain evidence that might implicate or otherwise harm his friends. Secondly, the Court voiced concern that any close relationship between the third party and those suspected of criminal acts would result in the "real culprits [having] access to the property . . . [which] could easily result in the disappearance of the evidence, whatever the good faith of the third party."[162] In view of these potential impediments to the efforts of law enforcement agencies, the Court concluded that the use of search warrants is necessary to secure and preserve valuable evidence.[163]

The final section of the majority opinion addressed the question of whether and to what extent First Amendment considerations should modify the application of the Fourth Amendment when the subject of the search is a newspaper office. Justice White began by reciting the threats to the due functioning of the press claimed by the *Daily* to arise from such searches: 1) physical disruption resulting in publication delays; 2) loss of confidential sources; 3) deterrence of the recording and preservation of information; 4) chilling of the processing and dissemination of news; and 5) resort to self-censorship on the part of the press.[164] After acknowledging that the struggle which gave birth to the Fourth Amendment was largely one " 'between the Crown and the press,' "[165] Justice White briefly reviewed the judicial history of the tension between the First and Fourth Amendments. He referred to prior

160. *Id.* This assertion by the Court seems to ignore the possibility that the innocent third party may have a valid objection to the search on the ground that it is an unnecessary and unreasonable invasion of privacy.

161. *Id.* at 561.

162. *Id.*

163. *Id.* at 563. For an analysis of this aspect of the Court's opinion, *see* notes 232-35 and accompanying text *infra*.

164. 436 U.S. at 563-64.

165. *Id.* at 564 (quoting Stanford v. Texas, 379 U.S. 476, 482 (1965)). The Court also noted that "[w]here the materials sought to be seized may be protected by the First Amendment, the requirements of the Fourth Amendment must be applied with 'scrupulous exactitude.' " 436 U.S. at 564 (quoting Stanford v. Texas, 379 U.S. at 485).

decisions of the Court which had invalidated as too broad a warrant authorizing the search of a private home for materials relating to the Communist Party,[166] and which rejected as unconstitutional searches pursuant to a warrant where the required showing of probable cause was not made before a neutral and disinterested magistrate.[167] But in contrast to the district court's view that these First Amendment considerations require the use of a subpoena rather than a search warrant,[168] the Court concluded:

> [T]he prior cases do no more than insist that the courts apply the warrant requirements with particular exactitude when First Amendment interests would be endangered by the search. As we see it, no more than this is required where the warrant requested is for the seizure of criminal evidence reasonably believed to be on the premises occupied by a newspaper.[169]

Having articulated this standard for the issuance of warrants authorizing searches of newspaper offices, the Court examined the specific harms cited by the district court in support of its rule requiring the use of subpoenas. Justice White first stated his confidence in the ability of local magistrates to guard against searches of the type and scope that would actually interfere with the timely publication of a newspaper.[170] He further emphasized that if the requirement of reasonableness and specificity were properly applied to the issuance of search warrants, there would be no opportunity for police to rummage at large through newspaper offices; a search would therefore not inhibit editorial or publication decisions.[171] Finally, citing *Branzburg v. Hayes*,[172] Justice White underscored the Court's doubts that confidential sources would

166. Stanford v. Texas, 379 U.S. 476 (1965). The search warrant issued in *Stanford* was held to be the functional equivalent of a general warrant, the use of which it was the purpose of the Fourth Amendment to forbid. *Id.* at 480. *Cf.* note 165 *supra* (terms of the Fourth Amendment must be applied with "scrupulous exactitude" when First Amendment values are at stake).

167. *See, e.g.*, Lee Art Theatre, Inc. v. Virginia, 392 U.S. 636, 637 (1968) (obscene films); Marcus v. Search Warrant, 367 U.S. 717, 732 (1961) (obscene publications). The search warrants in these cases were held defective because their issuance was based solely on the conclusory allegations of police officers, without any independent inquiry by the magistrates. *See* 392 U.S. at 637; 367 U.S. at 732.

168. *See* notes 123-30 and accompanying text *supra*.

169. Zurcher v. Stanford Daily, 436 U.S. at 565.

170. *Id.* at 566.

171. *Id. See also id.* at 565: "Properly administered, the preconditions for a warrant—probable cause, specificity with respect to the place to be searched and the things to be seized, and overall reasonableness—should afford sufficient protection against the harms that are assertedly threatened by warrants for searching newspaper offices."

172. 408 U.S. 665 (1972). *Branzburg* held that the First Amendment does not afford a newspaper reporter a constitutional privilege against testifying before a grand jury regarding criminal activity he observed while performing his newsgathering function. Claims that

disappear or that the press would engage in self-censorship if searches of newspaper offices could be authorized by the issuance of warrants. Whatever marginal effect such searches might have on newsgathering, he noted, "does not make a constitutional difference in our judgment."[173]

The majority opinion concluded by pointing out that since the date of the search which gave rise to the instant action, there had been very few third-party searches of newspaper offices.[174] From this the Court inferred that law enforcement agencies were not abusing their power under the Fourth Amendment.[175] Any such abuses could be dealt with as they arose, an unlikely occurrence in the Court's view given the power of the press.[176] The Court also rejected the *Daily*'s claim that it should have been afforded an opportunity to litigate the state's right to obtain the materials sought before they were seized.[177] A subpoena requirement was not regarded as providing the press any greater protection than permitting searches pursuant to a warrant, since a showing of relevancy sufficient to support a finding of probable cause would, in the Court's view, also justify the issuance of a subpoena.[178] The Court did leave open the possibility of legislative or executive action "to establish nonconstitutional protections against possible abuses

forced disclosure by newspersons of confidential information or sources relating to criminal activity would greatly damage their effectiveness were rejected by the court. *Id.* at 693-99.

173. Zurcher v. Stanford Daily, 436 U.S. at 566.

174. *Id.*

175. *Id.*

176. *Id.*: "The press is not only an important, critical, and valuable asset to society, but it is not easily intimidated. . . ."

177. *Id.* The majority opinion stated that "presumptively protected materials are not necessarily immune from seizure under warrant for use at a criminal trial." *Id.* at 567. The Court found that most such seizures would not impose an unconstitutional prior restraint. *Id.* (citing Heller v. New York, 413 U.S. 483 (1973)).

178. 436 U.S. at 567. It should be noted, however, that with a warrant, the determination as to the existence of probable cause to search is made in an *ex parte* proceeding, whereas if a subpoena duces tecum is issued, the person or entity at whom it is directed will have an opportunity to litigate the issue of the state's entitlement to the material *before* it is seized. Thus, the opportunity to contest allegations of such entitlement may result in the quashing of the subpoena and the consequent preservation of the confidentiality of the material. In contrast, even if the validity of a search warrant can be successfully challenged, such a ruling can only be obtained after the material has been seized, when the harms arising from its disclosure will have already occurred. *See id.* at 575-76 (Stewart, J., joined by Marshall, J. dissenting). *See also* Branzburg v. Hayes, 408 U.S. 665, 710 (Powell, J., concurring).

In addition, the Court noted that certain privileges against complying with a subpoena, such as those based on the Fifth Amendment or a state shield law, "are largely irrelevant to determining the legality of a search warrant under the Fourth Amendment." 436 U.S. at 567. Utilization of the warrant procedure therefore permits the circumvention of important statutory and constitutional rights.

of the search warrant procedure."[179]

In addition to reiterating the contentions advanced and relied upon by the district court and adopted by the court of appeals,[180] Justice Stewart's dissenting opinion made two significant observations. Addressing the specific facts of the case, he pointed out that no showing had been made by the police that there was an existing emergency situation at the time the warrant was issued, nor was the evidence sought contraband or any other illegal instrumentality.[181] Moreover, there was no indication at the time the warrant was obtained that the *Daily* would not comply with a subpoena.[182] Given this situation, Justice Stewart argued that the police should have been required to establish the impracticability of a subpoena *before* the magistrate authorized the intrusion resulting from a search pursuant to a warrant.[183] The second important observation is Justice Stewart's contention that the First Amendment's specific guarantee of freedom of the press compels the conclusion that there is a significant difference between a search of a newspaper office and that of any other type of premises.[184] He found that the explicit constitutional protection for a free press justifies the rule prohibiting searches of newspaper offices pursuant to a warrant fashioned by the lower court.[185]

A separate dissent was filed by Justice Stevens,[186]wherein he argued that the Court had erred in its application of the doctrine of *War-*

179. *Id.*

180. *Id.* at 570-74 (Stewart, J., joined by Marshall, J., dissenting).

181. *Id.* at 574-75.

182. *Id.* at 575 & n.9.

183. *Id.* at 575.

184. *Id.* at 576. In addition to joining the majority opinion, Justice Powell wrote a separate concurring opinion in which he challenged this aspect of Justice Stewart's dissent. Justice Powell pointed out that the Fourth Amendment was largely a response to the struggle between the Crown and the press. 436 U.S. at 569 (Powell, J., concurring). Given this history, Justice Powell stated that if the Framers had wished to accord the press special protection against searches otherwise authorized by the Fourth Amendment, they would have formulated that Amendment explicitly to reflect that desire. *Id.* As Justice Stevens pointed out in his dissenting opinion, however, searches of the type carried out in the *Daily*'s offices—those for documentary evidence—were not permitted until the Court's decision in Warden v. Hayden, 387 U.S. 294 (1967). 436 U.S. at 577-79 (Stevens, J., dissenting). *See* notes 187-89 and accompanying text *infra*. In Justice Powell's view, First Amendment values can adequately be vindicated by a magistrate's consideration of the rights of the free press in connection with his determination of the reasonableness of the requested warrant. 436 U.S. at 570 & n.3 (Powell, J., concurring).

185. *Id.* at 576 (Stewart, J., dissenting, joined by Marshall, J.). Justice Stewart endorsed the district court decision only insofar as it granted special protection to newspapers. He agreed with the majority that the Fourth Amendment does not generally forbid third-party searches. *Id.* at 571 n.1.

186. *Id.* at 577 (Stevens, J., dissenting).

den v. Hayden.[187] The Court in *Hayden* extended the permissible scope of searches to include the seizure of "mere evidence," generally defined as documentary materials, in addition to that of the traditional objects of a search: contraband, weapons and plunder.[188] Justice Stevens noted that the pre-*Hayden* limitation on the permissible objects of a search had had the effect of restricting the category of persons who could properly be subjected to a search.[189] By permitting the seizure of documentary evidence of crime, the *Hayden* decision greatly expanded the number of persons whose privacy interests could be infringed by such searches. Where the object of the search is contraband or the fruits of crime, Justice Stevens found it reasonable to infer that the possessor is involved in criminal activity and that if given prior notice of the search will dispose of the evidence.[190] In such cases a showing of probable cause to believe that the individual is in fact in possession of such objects justifies the invasion of privacy.[191] But where mere documentary evidence, such as that sought from the *Stanford Daily*, is involved, the custodian is much less likely to be guilty of criminal wrongdoing and is more likely to honor a subpoena or informal request to produce the material.[192] In such cases, Justice Stevens contended that the probable cause standard can only be satisfied by a showing that the subject of the search is involved in criminal activity or, if given notice, will conceal or destroy the evidence.[193] Since no such showing was made in the warrant application in *Zurcher*, Justice Stevens would have held that the search of the *Daily* offices was unreasonable and therefore violative of the Fourth Amendment.[194]

2. Analysis

In order better to analyze the Court's decision in *Zurcher*, consideration of the case will be trisected. The first section will examine the validity of the Court's holding that the Fourth Amendment does not grant special protection to non-culpable third-party possessors of evidence sought by law enforcement agencies. The second section will evaluate the necessity of using search warrants rather than subpoenas. The third section will scrutinize the possible harm to the press that may

187. 387 U.S. 294 (1967).
188. *Id.* at 300-10.
189. 436 U.S. at 579 (Stevens, J., dissenting).
190. *Id.* at 581.
191. *Id.*
192. *Id.*
193. *Id.* at 582-83.
194. *Id.* at 583.

arise in the wake of *Zurcher*. The potential for legislative or executive action to bolster the First Amendment guarantees potentially threatened by the decision will also be discussed.

Before embarking on this specific analysis, however, it is important to make one general observation regarding the contrast between the approach taken by a majority of the Supreme Court in *Zurcher* and that adopted by the district court and echoed by several justices who dissented from the Court's decision. The crucial difference is that a majority of the Supreme Court treated *Zurcher* essentially as a case posing issues relating to the construction and application of the Fourth Amendment. Consequently, the First Amendment issues were given secondary importance by the Court. In contrast, the district court and several dissenters on the Supreme Court focused directly on the First Amendment implications of a search of a newspaper office. The *Zurcher* majority first inquired whether or not the state had a valid interest in and probable cause to conduct the search. Once that was established, the Court required only that the warrant requirements be applied with "scrupulous exactitude" when the premises to be searched are a newspaper office.[195] Conversely, the district court and Justices Stewart and Marshall looked first to the *Stanford Daily*'s rights under the First Amendment and then sought to weigh those rights against the state's interest in obtaining the materials. Finding that the state had failed to show that the evidence sought could not be obtained in a less intrusive manner than by a search pursuant to a warrant, the district court and these dissenters urged that an appropriate balancing of interests could best be struck by limiting the use of search warrants against newspapers to those instances where a subpoena duces tecum would be impracticable.[196]

a. The Court's Interpretation of the Fourth Amendment

The Supreme Court based its rejection of the district court's interpretation of the Fourth Amendment on a number of grounds, each of which merits examination. The first was that nothing in the language of the Fourth Amendment precludes the issuance of third-party search warrants. The Court rejected as inapposite the authorities relied upon by the district court[197] and founded its own view on language in *United States v. Kahn*[198] which suggested that search warrants are not directed

195. *Id.* at 564 (majority opinion). *See* text accompanying note 169 *supra*.
196. 436 U.S. at 575 (Stewart, J., joined by Marshall, J., dissenting).
197. *Id.* at 554. *See* note 137 and accompanying text *supra*.
198. 415 U.S. 143 (1974).

at persons but rather at "places" and "things."[199] The inference the Court appeared to draw from *Kahn* was that the requirements of the Fourth Amendment are satisfied, even where the person or persons at whom the search is directed are not specified, when probable cause for the search is demonstrated.[200] Although the Court's reliance on *Kahn* may not have been well founded,[201] it is the summary rejection of the authorities cited by the district court that requires closer examination.

The Court's rejection of the four state cases cited in the district court opinion[202] is understandable in light of its ruling in *Warden v. Hayden*[203] that "mere evidence" can properly be the object of a search.[204] Since the cases relied upon by the lower court were pre-*Hayden* decisions which did not address the specific question of whether the issuance of a subpoena is a preferable alternative to the use of a search warrant, they were properly held inapposite by the Supreme Court. The same cannot be said for the Court's rejection of the district court's argument by analogy to *Bacon v. United States*.[205] In *Bacon* the Ninth Circuit Court of Appeals held the issuance of a warrant for the arrest of a material witness invalid for failure to establish probable cause to believe that securing the witness's presence by means of subpoena would be impractical.[206] The district court in *Zurcher* accepted the *Daily*'s argument that "if one not suspected of a crime cannot be *arrested* unless there is a showing that subpoena is impracticable, one not suspected of a crime cannot be searched unless there is a showing

199. *Id.* at 155 n.15.

200. 436 U.S. at 555.

201. A careful reading of the cited footnote in *Kahn* makes the Court's reliance on it questionable. *Kahn* dealt with the question of whether the wiretapped conversations of a person not named in the application seeking authorization for the wiretap could subsequently be used as evidence to prosecute the subject of the tap. But the basis for the decision in *Kahn* was the Court's construction of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 (1976); it did not rest upon constitutional grounds. *See* 415 U.S. at 150, 152-55. The footnote cited by the Court in *Zurcher* was therefore merely dicta. Further, the *Kahn* Court stated in the same footnote that "even a warrant failing to name the owner of the premises at which a search is directed, *while not the best practice*, has been held to pass muster under the Fourth Amendment." *Id.* at 155 n.15 (emphasis added). It thus appears that while search warrants which do not specify the person from whom the material is to be seized are permissible, the Court in *Kahn* did attach some importance to naming the party whose premises are to be searched, an emphasis not reflected in the *Zurcher* Court's reference to *Kahn*.

202. Owens v. Way, 141 Ga. 796, 82 S.E. 132 (1914); Newberry v. Carpenter, 107 Mich. 567, 65 N.W. 530 (1895); People v. Carver, 172 Misc. 820, 16 N.Y.S.2d 268 (County Ct. 1939); Commodity Mfg. Co. v. Moore, 198 N.Y.S. 45 (Sup. Ct. 1923).

203. 387 U.S. 294 (1967).

204. *Id.* at 301-02.

205. 449 F.2d 933 (9th Cir. 1971).

206. *Id.* at 943.

that a subpoena duces tecum is impracticable."[207] In response to the argument that *Bacon* dealt only with the issue of permissible grounds for an arrest and was not a search and seizure case, the district court replied: "But historically the right against unlawful seizures has if anything been *more* protected, not less protected, than the right against unlawful arrests."[208] The argument by analogy to *Bacon* was deemed strong enough by the district court, and subsequently by the court of appeals, to compel the conclusion that no search warrant can issue against a third party unless the state shows that resort to a subpoena is impractical.[209] Given this heavy reliance on *Bacon*, it would appear that the case merited greater attention from the Supreme Court than its summary treatment in a footnote.[210]

The second ground relied upon by the Supreme Court in reversing the district court decision was that the culpability of the third-party property holder is immaterial to the state's interest in enforcing its criminal law and recovering evidence of crime.[211] The Court bolstered this contention by reference to *Camara v. Municipal Court*[212] and *See v. City of Seattle*.[213] The applicability of *Camara* and *See* in the factual context of *Zurcher* is questionable for several reasons. First, at least insofar as *Camara* is concerned, it is not at all clear that the culpability of the property holder was not a factor in the Court's decision.[214] Secondly, neither of these cases arose initially out of situations involving the issuance of search warrants. The common issue in *Camara* and *See* was whether city health and fire inspectors could enter private premises without judicial authorization for the purpose of conducting inspections to determine compliance with municipal ordinances. Petitioners

207. 353 F. Supp. at 129 (emphasis in the original) (footnote omitted).

208. *Id.* at 130 (emphasis in the original) (citing Kaplan, *Search and Seizure: A No-Man's Land in Criminal Law*, 49 CAL. L. REV. 474 (1961); Orfield, *Warrant of Arrest in Summons upon Complaint in Federal Criminal Procedure*, 27 U. CIN. L. REV. 1 (1958)). Defendants had also attempted to distinguish *Bacon* on the ground that it was based on 18 U.S.C. § 3149 (1976) and Rule 46(b) of the Federal Rules of Criminal Procedure rather than the Fourth Amendment. *See* 353 F. Supp. at 129. The district court ruled, however, that the procedures set out in the Federal Rules are mandated by the Fourth Amendment. *Id.* (citing Jones v. United States, 357 U.S. 493 (1958); Giordenello v. United States, 357 U.S. 480 (1958)).

209. 353 F. Supp. at 130.

210. Justice White rejected the applicability of *Bacon* because "that case dealt with arrest of a material witness and is unpersuasive with respect to the search for criminal evidence." Zurcher v. Stanford Daily, 436 U.S. at 554 n.5.

211. *Id.* at 555.

212. 387 U.S. 523 (1967).

213. 387 U.S. 541 (1967).

214. *See* note 152 *supra*.

in both cases insisted that the inspectors obtain search warrants before they would grant them permission to enter. The Supreme Court subsequently vindicated their claims, holding that a search warrant is required for such inspections.

Since search warrants were required in *Camara* and *See* regardless of the culpability of the property-holders there, the *Zurcher* Court seemed to infer that the same rule should hold true in the case before it. The difficulty with this analysis is that in *Camara* and *See* there existed no less burdensome alternative to the use of a search warrant, while there was such an alternative in *Zurcher*. The only viable method for inspecting a personal residence or business premises is by a search. The same is not true in situations such as that presented in *Zurcher*, where the magistrate could have issued a subpoena for the desired materials and thereby accomplished their acquisition. In view of the Court's apparent unwillingness to consider the district court's analysis based on its analogy to *Bacon*,[215] it seems inconsistent for the Court to have relied on such distinguishable cases as *Camara* and *See*.

An additional problem with the majority's discussion of the culpability question is its failure to squarely address two arguments made by the lower court. The district court stated that "as a historical matter the notion of search warrants has involved only those suspected of a crime."[216] It was perhaps in response to this observation that the Supreme Court presented its analysis of Rule 41 of the Federal Rules of Criminal Procedure to show that considerations relating to searches and seizures are separate and distinct from arrest procedures.[217] If so, the Court missed the thrust of the district court's argument. The lower court only felt that in light of the historical limitation on the use of search warrants to those suspected of crime, a less burdensome alternative that could achieve the same results should be utilized to obtain evidence from innocent third parties.[218]

The district court also noted that the practice of issuing search

215. *See* notes 205-10 and accompanying text *supra*.

216. 353 F. Supp. at 131. In support of this contention, the district court cited Henry v. United States, 361 U.S. 98, 100 (1959); United States v. Poller, 43 F.2d 911, 914 (2d Cir. 1930) (opinion of Learned Hand, J.); Kaplan, *Search and Seizure: A No-Man's Land in Criminal Law*, 49 CAL. L. REV. 474, 475-77 (1961).

217. *See* 436 U.S. at 558-59 (citing ALI, A MODEL CODE OF RE-ARRAIGNMENT PROCEDURE, COMMENTARY 491 (Proposed Off. Draft 1975)). *See also* United States v. Manufacturers Nat'l Bank, 536 F.2d 699, 703 (1976), *cert. denied sub nom.* Wingate v. United States, 429 U.S. 1039 (1977). *See* text accompanying note 157 *supra*.

218. *Cf.* 436 U.S. at 582-83 (Stevens, J., dissenting) (where the object of a search is an innocent third party, probable cause can only be established by a showing that if notice were given, he would conceal or destroy the evidence sought).

warrants without regard to the culpability of the person at whom the search is directed results in the inequitable treatment of innocent third parties. Whereas the exclusionary rule is available to vindicate the rights of criminal defendants, "[a] third-party . . . does not have the protection or deterrent of the exclusionary rule, for by definition he is not about to be tried for a crime."[219] Consequently, the district court held that in the case of an innocent third party, "an additional safeguard is necessary to assure that his Fourth Amendment rights are not trampled. That protection is the obligation of law enforcement to use a subpoena duces tecum unless it is shown, through sworn affidavits, that it is impractical to do so."[220]

Justice White was unpersuaded as to the necessity of this additional requirement. He asserted that the existing provisions and interpretations of the Fourth Amendment constitute an adequate balancing of the individual's right of privacy against the public need, regardless of whether a subpoena duces tecum is a less intrusive alternative.[221] The majority went further in rejecting the need for additional Fourth Amendment protections, relying on the reasoning of the Court's opinion in *Alderman v. United States*[222] to conclude that "the interest in deterring illegal third-party searches does not justify a rule such as that adopted by the District Court."[223] The majority also stated that "it would be placing the cart before the horse to prohibit searches otherwise conforming to the Fourth Amendment because of a perception that the deterrence provided by the existing rules of standing is insufficient to discourage illegal searches."[224] Finally, the district court was chastised for having overlooked the California Supreme Court's previ-

219. 353 F. Supp. at 132.

220. *Id.* (footnote omitted).

221. 436 U.S. at 559.

222. 394 U.S. 165 (1969). In *Alderman*, Justice White, writing for a majority of the Court, noted that "[t]he established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence." *Id.* at 171-72. *See, e.g.*, Wong Sun v. United States, 371 U.S. 471, 492 (1963); Goldstein v. United States, 316 U.S. 114, 121 (1942). He went on to state that "[w]e adhere to . . . the general rule that Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." 394 U.S. at 174. *See* Simmons v. United States, 390 U.S. 377, 389 (1968); Jones v. United States, 362 U.S. 257, 260-61 (1960).

223. 436 U.S. at 562 n.9. The Court in *Alderman* had ruled that the additional deterrent effect of extending the exclusionary rule did not "justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth." 394 U.S. at 175.

224. 436 U.S. at 562-63 n.9 (citing Warden v. Hayden, 387 U.S. 294, 309 (1967)).

ous ruling in *Kaplan v. Superior Court*[225] that the legality of a search and seizure can be challenged by anyone against whom the evidence obtained is used, regardless of whether his own Fourth Amendment rights were violated. In this vein, however, the *Zurcher* Court failed to recognize the apparent inconsistency between its views and the reasoning underlying *Kaplan*. In extending the applicability of the exclusionary rule beyond the parameters delineated in *Alderman*, the California Supreme Court in *Kaplan* reaffirmed its position that " 'if law enforcement officers are allowed to evade the exclusionary rule by obtaining evidence in violation of the rights of third parties, its deterrent effect is to that extent nullified. Moreover, such a limitation virtually invites law enforcement officers to violate the rights of third parties . . . .' "[226] But it was left unclear by the Supreme Court in *Zurcher* how California law would provide any protection for the rights of the *Stanford Daily* and its staff in an action for declaratory and injunctive relief brought in federal court under a federal statute.[227] If *Kaplan* grants the *Daily* no substantive rights, its very inapplicability together with its rationale would seem to support the district court's perception that additional Fourth Amendment protections are required for third-party searches. Thus, the *Zurcher* majority's reference to *Kaplan* does not resolve the question of the need for additional protections, but rather serves to call attention to the differing views of the United States and California Supreme Courts.

b. The State's Interest—The Necessity of Search Warrants

One basis for the district court's holding was its belief that requiring a subpoena for most third-party searches would not substantially impede criminal investigations. A majority of the Supreme Court found, however, that the state's interest in efficient and successful law enforcement would be seriously disserved if the use of search warrants was limited as provided under the lower court opinion. Two hypothetical examples of this undermining influence were advanced in the body of the majority opinion, with a third possibility discussed in a footnote.[228] Because search warrants are frequently employed early in an investigation, the Court suggested that the "seemingly blameless" third party who possesses the evidence may not turn out to be innocent after

225. 6 Cal. 3d 150, 491 P.2d 1, 98 Cal. Rptr. 649 (1971).

226. 6 Cal. at 157, 491 P.2d at 8, 98 Cal. Rptr. at 656 (quoting People v. Martin, 45 Cal. 2d 755, 760, 290 P.2d 855, 860 (1955)).

227. The action in *Zurcher* was brought pursuant to 42 U.S.C. § 1983 (1976). *See* note 122 *supra*. The district court had jurisdiction under 28 U.S.C. § 1343(3) (1976).

228. 436 U.S. at 561 & n.8.

all—and even if not directly culpable might still not be relied upon to surrender evidence which implicates his friends.[229] As a corollary to this possibility, Justice White stated that "it is likely that the real culprits will have access to the property, and the delay involved in employing the subpoena *duces tecum* . . . could easily result in the disappearance of the evidence."[230] Finally, it was suggested in a footnote that the use of a subpoena would allow the recipient to interpose a Fifth Amendment challenge to the request, and that the resultant litigation could "seriously impede criminal investigations."[231]

The Court's concern regarding the first two problems is unsupported either by authority or specific examples indicating the extent to which such problems have occurred in the past. As Justice Stevens pointed out in his dissenting opinion, prior to the change brought about by the Court's decision in *Warden v. Hayden*,[232] documentary evidence was routinely obtained by subpoena.[233] This procedure assumed that the person in possession of the evidence would honor the subpoena, and the *Zurcher* majority did not question its effectiveness. Moreover, the Court's assertion that problems of preserving evidence would occur and thereby hamper law enforcement efforts is not supported by the facts in *Zurcher*. As the district court pointed out, "[t]here was no hint whatsoever that the sought after materials would be destroyed or removed from the jurisdiction."[234] Although the *Daily* apparently had announced a policy of destroying any photographs that might implicate the protesters,[235] there is no evidence that such a destruction took place and the majority did not cite this policy in support of its holding. Even if it could be assumed that the *Daily* would not have preserved evidence of the assault on the police, it is unlikely that the same problem would arise in other factual contexts. It is difficult to believe, for example, that when a member of a newspaper staff photographs a bank robbery, he will return the incriminating photographs to the bank robbers. And it can be assumed that third parties will generally not act so as to impede criminal investigations. Yet this is what the unqualified language in *Zurcher* appears to suggest.

The third impediment to law enforcement efforts said to arise from the enforced use of the subpoena procedure—that challenges to the va-

229. *Id.* at 561.
230. *Id.*
231. *Id.* at 561-62 n.8.
232. 387 U.S. 294 (1967). *See* notes 187-89 and accompanying text *supra*.
233. 436 U.S. at 581 (Stevens, J., dissenting).
234. 353 F. Supp. at 129 n.2.
235. 436 U.S. at 568 n.1 (Powell, J., concurring).

lidity of subpoenas on Fifth Amendment grounds could be interposed and would slow investigations—is similarly based on conjecture and unsupported by authority. It seems doubtful that a third party would object to a subpoena merely out of a desire not to cooperate with the authorities. After all, such a course of conduct might result in the police focusing their attention on an individual previously believed innocent of any wrongdoing. And if the possessor of the evidence does have a valid Fifth Amendment claim, there is no reason why he should not be given an opportunity to assert it. Given the speculative nature of the other problems cited by the Court, it is questionable whether this additional concern justifies the Court's endorsement of the belief that "the warranted search is necessary to secure and to avoid the destruction of evidence."[236]

c. The Impact of Zurcher *on First Amendment Guarantees*

At the root of the decision in *Zurcher* is the belief on the part of the majority that searches authorized by warrants, when properly conducted, will not significantly impinge on the functioning of a free press.[237] This belief and the specific conclusions derived therefrom by the Court were challenged in Justice Stewart's dissenting opinion, in which Justice Marshall joined. Although he agreed with the majority's conclusion as to the permissibility of third-party searches under the Fourth Amendment,[238] Justice Stewart argued that the First Amendment's express grant of protection to the press justifies requiring the use of a subpoena rather than a search warrant when the possessor of the evidence is a newspaper. He found it "self-evident that police searches of newspaper offices burden the freedom of the press,"[239] pointing out that such searches can be lengthy and disruptive[240] and would necessarily entail police examination of materials obtained from informers and other confidential sources—a prospect which could compel the newspaper to engage in self-censorship.[241]

Regarding the detrimental effect such searches would have on the vital confidential relationships developed by reporters, Justice Stewart

236. *Id.* at 563 (footnote omitted).

237. *See* notes 164-73 and accompanying text *supra*.

238. 436 U.S. at 571 n.1 (Stewart, J., joined by Marshall, J., dissenting).

239. *Id.* at 571.

240. *See, e.g.*, Note, *Search and Seizure of the Media: A Statutory, Fourth Amendment and First Amendment Analysis*, 28 STAN. L. REV. 957, 957-59 (1976) (describing one search of a Los Angeles radio station that lasted over eight hours).

241. 436 U.S. at 573 n.6 (Stewart, J., joined by Marshall, J., dissenting).

distinguished the ruling in *Branzburg v. Hayes*,[242] relied on by the majority,[243] from the instant case. He pointed out that whereas *Branzburg* dealt with "the more limited disclosure of a journalist's sources caused by compelling him to testify,"[244] the question in *Zurcher* was not whether there is an absolute First Amendment privilege against disclosure, but rather what is the most appropriate and least burdensome means of acquiring relevant evidence from a newspaper.[245] After reviewing the circumstances leading to the issuance of the search warrant,[246] he concluded that no impediment to law enforcement had been demonstrated in *Zurcher*, but that there was a great potential for harm in the wake of the majority's decision.[247]

Media concern over the impact of the *Zurcher* decision may be lessened if the legislature or the executive branch acts on the invitation extended by the majority to enact suitable safeguards against abuses of discretion in the issuance of search warrants directed at newspapers.[248]

II. The Broadcast Media and the First Amendment: *Federal Communications Commission v. Pacifica Foundation*

In *Federal Communications Commission v. Pacifica Foundation*,[249] the United States Supreme Court was called upon to decide whether the Federal Communications Commission (FCC) has statutory and constitutional authority to impose sanctions for the broadcasting of language which, although not obscene, can be characterized as "indecent" and "patently offensive" when broadcast at a time when children are likely to be in the listening audience.[250] In resolving this question, the Court considered whether non-obscene speech can properly be re-

242. 408 U.S. 665 (1972).

243. *See* note 172 and accompanying text *supra*.

244. 436 U.S. at 574 (Stewart, J., joined by Marshall, J., dissenting).

245. *Id.*

246. *See* notes 181 & 182 and accompanying text *supra*.

247. 436 U.S. at 572-74 & n.8. Justice Stewart's concern over the effect the *Zurcher* decision will have on the press has been echoed by representatives of the mass media since the decision was handed down. *See, e.g.*, Javoslovsky, *Police in the Newsroom: The Stanford Case*, Wall St. J., June 20, 1978, at 20, cols. 4-6; Wall St. J., June 13, 1978, at 24, cols. 1-2; S.F. Chronicle, June 27, 1978, at 11, cols. 2-5.

248. *See* note 179 and accompanying text *supra*.

249. 98 S. Ct. 3026 (1978).

250. For discussions of the FCC's power to regulate obscene language, *see generally*, Comment, *Broadcasting Obscene Language: The Federal Communications Commission and Section 1464 Violations*, 1974 ARIZ. ST. L.J. 457 (1974); Note, *Morality and the Broadcast Media: A Constitutional Analysis of FCC Regulatory Standards*, 84 HARV. L. REV. 664 (1971); Note, *Filthy Words, the FCC, and the First Amendment: Regulating Broadcast Obscenity*, 61 VA. L. REV. 579 (1975); Note, *Offensive Speech and the FCC*, 79 YALE L.J. 1343 (1970).

stricted as to the time, place and manner of its dissemination, and also whether a distinction can constitutionally be drawn between "indecent" and "obscene" language.

A. The Decision

In the early afternoon of October 30, 1973, a man and his young son were driving in New York City and listening to Station WBAI, licensed to the Pacifica Foundation. A comedy monologue by satirist George Carlin was being broadcast as part of a regularly scheduled live program, "Lunchpail," whose subject that day was an analysis of attitudes towards language held by contemporary society. The monologue, entitled "Filthy Words," was originally delivered before a live theatre audience, and sought to ridicule societal restrictions on the use of certain words, especially over the airways.[251] The father subsequently filed a complaint with the FCC stating that the airing of the monologue during a time when children were likely to be listening should not have been permitted.

On February 21, 1975, the Commission responded to the complaint by issuing a Memorandum Opinion and Declaratory Order granting the complaint and holding that Pacifica "could have been the subject of administrative sanctions" for the broadcast.[252] The Commission derived its authority to regulate indecent broadcasting from 18 U.S.C. § 1464, which specifically prohibits "obscene, indecent or pro-

251. "Filthy Words" is a monologue from the live album "George Carlin, Occupation: Foole," by Little David Records. A transcript of the monologue is appended to the decision of the Supreme Court, 98 S. Ct. at 3041-43. The words identified by the satirist were "shit," "piss," "fuck," "cunt," "cocksucker," "motherfucker" and "tits." They were not meant by him to comprise an exhaustive list; to the "original seven" words, Carlin would add "fart, turd, and twat." 98 S. Ct. at 3043. Although the FCC did not consider these additions to the list in its opinion, holding only that the broadcast of the "original seven" was indecent, 56 F.C.C.2d 94, 99 (1975), sanctions presumably could be imposed by the Commission in the future should it be determined that "fart, turd, and twat" are indecent as well. Other words might well be considered. For example, Georgia state Senator Julian Bond and the NAACP have filed suit with the FCC seeking to have the word "nigger" added to the list. S.F. Sunday Examiner & Chronicle, Aug. 20, 1978 (World), at 27.

252. 56 F.C.C.2d 94, 99 (1975). The Commission declined to impose formal sanctions on Pacifica, noting instead that the Order would be "associated with the station's license file," *id.*, and would be considered in the event subsequent complaints were filed. Under 47 U.S.C. § 503(b)(1) (1970), the Commission is empowered to impose forfeitures for violations of 18 U.S.C. § 1464 (1976). *See* note 253 *infra*. Specifically: "(1) Any licensee or permittee of a broadcast station who . . . (E) violates section . . . 1464 of Title 18, shall forfeit to the United States a sum not to exceed $1000. Each day during which such violation occurs shall constitute a separate offense. Such forfeiture shall be in addition to any other penalty provided by this chapter." 47 U.S.C. § 503(b)(1) (1970).

fane language,"[253] and from 47 U.S.C. § 303(g) which generally requires the Commission to "encourage the larger and more effective use of radio in the public interest."[254] In reaching its determination that the Carlin monologue was indecent, the Commission first observed that the broadcast medium has special qualities of intrusiveness which require a different standard of analysis than is normally applied to other, less intrusive forms of expression.[255] Particularly important to the Commission was the possibility, recognized by the Supreme Court in *Miller v. California*,[256] that inherent in the broadcasting medium is " 'a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles.' "[257]

Turning to the definition of "indecent," the Commission explained that, in its view, the term was not subsumed under the concept of obscenity, but was instead subject to an independent definition.[258] In reformulating the definition of "indecent" under section 1464,[259] the

253. 56 F.C.C.2d at 94 n.1. 18 U.S.C. § 1464 (1976) provides in full: "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both." The Commission had previously defined "indecent" to mean material that is "(a) patently offensive by contemporary community standards; and (b) is utterly without redeeming social value." Eastern Educ. Radio (WUHY), 24 F.C.C.2d 408, 412 (1970).

254. 56 F.C.C.2d at 94 n.1. 47 U.S.C. § 303(g) (1970) outlines the general powers and duties of the Commission.

255. 56 F.C.C.2d at 96-97. The Commission advanced four considerations in support of its view that a different standard of analysis is required for the broadcast media: "(1) [C]hildren have access to radios and in many cases are unsupervised by parents; (2) radio receivers are in the home, a place where people's privacy interest is entitled to extra deference, see Rowan v. Post Office Dept., 397 U.S. 728 (1970); (3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and (4) there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest." *Id.* at 97.

256. 413 U.S. 15 (1973). *See* note 278 *infra*.

257. 56 F.C.C.2d at 97 (quoting Miller v. California, 413 U.S. at 19).

258. 56 F.C.C.3d at 97. The Commission cited three federal circuit court of appeals decisions in support of its position: United States v. Smith, 467 F.2d 1126 (7th Cir. 1972) (term "indecent" not necessarily included within definition of "obscene" and should be defined on retrial); Tallman v. United States, 465 F.2d 282 (7th Cir. 1972) ("indecent" not defined by court, but no prejudice to defendant where he was prosecuted only for using "obscene" language); Gagliardo v. United States, 366 F.2d 720 (9th Cir. 1966) (held reversible error where trial court did not issue jury instructions defining the term "indecent").

Although no court had previously defined "indecent" under § 1464, the Commission itself had, prior to Miller v. California, defined the term to mean that "the material broadcast is (a) patently offensive by contemporary standards; and (b) is utterly without redeeming social value." Eastern Educ. Radio (WUHY), 24 F.C.C.2d 408, 412 (1970). Inasmuch as this definition was tied to the then existing obscenity standard, Memoirs v. Massachusetts, 383 U.S. 413, 418 (1966), the Supreme Court's adoption of a new obscenity test in *Miller* required the Commission to update its definition of "indecent."

259. *See* note 258 *supra*.

Commission drew from the law of public nuisance.[260] Under nuisance law, behavior is generally *channelled* rather than *prohibited*. Thus, the Commission defined "indecent" to mean "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, *at times of the day when there is a reasonable risk that children may be in the audience*."[261] Although the Commission did not impose sanctions on the Pacifica Foundation, this new definition of "indecent" would, in future cases, allow the Commission to enforce its conviction that "such words [as the seven in the Carlin broadcast] are indecent within the meaning of the statute and have no place on radio when children are in the audience."[262]

In addition to the majority opinion, three concurring statements were filed. Commissioner Reid approved of the majority viewpoint but felt that it did not go far enough. In her opinion the indecent language of the monologue was inappropriate for broadcast at any time, whether night or day.[263] Whereas the Commission sought to channel broadcasts so as to limit possible exposure to children, Commissioner Reid would have prohibited indecent language from being broadcast at any time.[264] This view was shared by Commissioner Quello, who noted his support succinctly: "Garbage is garbage. . . . I believe such words are reprehensive no matter what the broadcast hour."[265]

260. 56 F.C.C.2d at 98. The Commission cited two federal decisions dealing with public nuisance statutes as examples of the principles supporting its new contextual definition of "indecent." *See* Von Sleichter v. United States, 472 F.2d 1244 (D.C. Cir. 1972); Williams v. District of Columbia, 419 F.2d 638 (D.C. Cir. 1969) (en banc). For criticism of the Commission's "nuisance" theory, see Chief Judge Bazelon's statement in favor of granting a rehearing en banc in Illinois Citizens Comm. for Broadcast v. FCC, 515 F.2d 397, 418-19 n.48 (D.C. Cir. 1975). *See also*, Pacifica Foundation v. FCC, 556 F.2d 9, 19 n.3 (D.C. Cir. 1977) (Bazelon, C.J., concurring). On the use of nuisance analysis as a method of regulating obscenity, *see generally*, Note, *Porno Non Est Pro Bono Publico: Obscenity as a Public Nuisance in California*, 4 HASTINGS CONST. L.Q. 385 (1977); Note, *Restricting the Public Display of Offensive Materials: The Use and Effectiveness of Public and Private Nuisance Actions*, 10 U.S.F. L. Rev. 232 (1975).

261. 56 F.C.C.2d at 98 (emphasis added).

262. *Id.* The Commission noted that a different standard for defining "indecent" might conceivably be used in the late evening hours when few children are in the audience. The definition would remain the same insofar as the language was concerned, *i.e.*, words which are patently offensive as measured by the contemporary community standards for the broadcast medium would remain prohibited. However, the Commission would also consider whether these late-evening expressions had serious literary, artistic, political or scientific value. 56 F.C.C.2d at 98 (citing Miller v. California, 413 U.S. 15 (1973)).

263. 56 F.C.C.2d at 102 (Reid, Comm'r., concurring).

264. *Id.* *See* notes 260-61 and accompanying text *supra*.

265. 56 F.C.C.2d at 103 (Quello, Comm'r., concurring).

Commissioner Robinson, joined by Commissioner Hook, concurred in the issuance of the order, but offered a more extensive review of the problems courts have faced in attempting to define the terms "obscene" and "indecent."[266] He noted that the " 'core problem'—what constitutes obscenity—has never been satisfactorily unraveled."[267] He noted as well that "people do not have an unlimited right to avoid exposure to [obscenity]."[268] In the view of Commissioners Robinson and Hook, the Commission's decision, embracing a "nuisance" analysis, adopted a limited but pragmatic approach to accommodating the interests protected by the First Amendment and the interests of the public in having the young protected from exposure to inappropriate language.

Shortly after the issuance of the order, the Radio Television News Directors Association (RTNDA) petitioned the Commission for clarification of the standards for determining indecency.[269] The RTNDA was concerned that the order would expose its members to the threat of sanctions when "indecent" words were uttered in the context of bona fide news or public affairs programs. The Commission reaffirmed its earlier decision, however, stressing that the order was issued in a specific factual context and was based primarily on the need to protect young children from sexually explicit language.[270] The Commission refused to comment on the hypothetical situations posed by the RTNDA and reiterated its conclusion that such language could only be broadcast, if at all, during the late evening hours.[271]

Following an appeal by the Pacifica Foundation, the Court of Appeals for the District of Columbia reversed the Commission.[272] Circuit Judge Tamm held that the order was issued in violation of the prohibition against censorship contained in 47 U.S.C. § 326,[273] and that even if

266. *Id.* at 103 (Robinson, Comm'r., joined by Hook, Comm'r., concurring).

267. *Id.* at 104 (citing Lockhart & McClure, *Obscenity Censorship: The Core Constitutional Issue—What is Obscene?*, 7 UTAH L. REV. 289 (1961)).

268. 56 F.C.C.2d at 106 (Robinson, Comm'r., joined by Hook, Comm'r., concurring).

269. 59 F.C.C.2d 892 (1976).

270. *Id.* at 893.

271. *Id.*

272. Pacifica Foundation v. FCC, 556 F.2d 9 (D.C. Cir. 1977). Chief Judge Bazelon and Circuit Judge Tamm filed separate opinions in favor of reversal; a dissenting opinion was entered by Circuit Judge Leventhal. For discussions of the Court of Appeals decision, see Note, *Pacifica Foundation v. FCC: "Filthy Words," the First Amendment and the Broadcast Media*, 78 COLUM. L. REV. 164 (1978); Note, *Constitutional Law—Pacifica Foundation v. FCC: First Amendment Limitations on FCC Regulation of Offensive Broadcasts*, 56 N.C.L. REV. 584 (1978).

273. 556 F.2d at 18. 47 U.S.C. § 326 (1970) provides: "Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio

the Commission had the authority to regulate non-obscene speech, the text of its order would have been subject to reversal on the grounds of vagueness and overbreadth.[274] The court of appeals was thus able to reverse the Commission on grounds which circumvented the need to define "indecent" under section 1464.

Chief Judge Bazelon concurred with the result reached by Judge Tamm, but felt that the protections against censorship provided by section 326 were not absolute because the terms of section 1464 authorized criminal punishment for anyone uttering "obscene, indecent, or profane" language over the radio.[275] Whereas Judge Tamm believed section 326 to be dispositive, Chief Judge Bazelon reformulated the issues to focus first on whether the Carlin monlogue would be protected by the First Amendment if disseminated by any other medium, and second whether the unique characteristics of broadcasting justified an expansion of governmental regulation of speech.[276] He concluded that the Commission's definition of "indecency" was prima facie unconstitutional.[277] Citing the strict standard for obscenity set forth by the Supreme Court in *Miller v. California*,[278] Chief Judge Bazelon found the order to be an overbroad, distorted interpretation of those guidelines.[279]

Examining the four circumstances claimed by the Commission to justify special regulation of speech disseminated over the broadcast medium,[280] Chief Judge Bazelon rejected the contention that the broad-

communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

In reversing the Commission, Judge Tamm stated his view that "[a]ny examination of thought or expression in order to prevent publication of objectionable material is censorship." 556 F.2d at 14.

274. Judge Tamm found the order to be vague because it lacked a definition of children, *id.* at 17, and that it was overbroad in that it prohibited the use of the seven indecent words in any context. *Id.*

275. *See* note 253 and accompanying text *supra*.

276. 556 F.2d at 20 (Bazelon, C.J., concurring).

277. *Id.* at 23.

278. 413 U.S. 15, 24 (1973). In rejecting as the constitutional standard the "*utterly* without redeeming social value" test articulated in Memoirs v. Massachusetts, 383 U.S. 413, 419 (1966) (emphasis in original), the Court in *Miller* set forth the following basic guidelines: "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest. . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." 413 U.S. at 24 (citation omitted).

279. 556 F.2d at 23 (Bazelon, C.J., concurring).

280. *See* note 255 *supra*.

casting of offensive speech may offend the privacy interests of nonconsenting adults in their homes. Relying on the Supreme Court decisions in *Erznoznik v. City of Jacksonville*,[281] *Cohen v. California*,[282] and *Rowan v. Post Office Department*,[283] he reasoned that the radio listener "can avert his attention by changing channels or turning off the set."[284] The Commission's argument that the presence of children in the listening audience justifies increased government regulation of broadcast speech was also rejected on the ground that individual parental control is preferable to state action *in loco parentis*.[285] Chief Judge Bazelon concluded his concurring opinion by expressing disagreement with the contention that the scarcity of broadcasting frequencies and other considerations warranted the order promulgated by the Commission.[286]

Circuit Judge Leventhal dissented and expressed his support for the order. He argued that its definition of "indecent" was "a functional equivalent to the Supreme Court's current 'obscenity' ruling (*Miller*),"[287] and that the time and place restrictions of the order were a reasonable "constitutional trade-off."[288] Unlike Judge Tamm[289] and Chief Judge Bazelon,[290] Judge Leventhal did not find the order overbroad since, in his view, it was carefully limited by the Commission to prohibit only the broadcasting of indecent language during the afternoon.[291] Nor, despite "some inexactness in the agency's approach," did Judge Leventhal find the order void for vagueness.[292]

281. 422 U.S. 205 (1975) (limited privacy interests of persons on public street cannot justify censorship of otherwise protected speech).

282. 403 U.S. 15 (1971) (absent particularized and compelling reasons, state may not make public display of four-letter expletive a criminal offense).

283. 397 U.S. 728 (1970) (approval given to statutory scheme permitting addressee to give notice that he wishes no further mailings from specific sender of erotic or sexually provocative matter).

284. 556 F.2d at 26 (Bazelon, C.J., concurring). Chief Judge Bazelon also found that people's privacy interests in their homes are reduced when they open up their home by turning on the radio. *Id.* at 27.

285. *Id.* at 27-29.

286. *Id.* at 29. Chief Judge Bazelon believed that Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), did not support the Commission's spectrum space arguments since unlike *Red Lion*, where the FCC's fairness doctrine raised questions of broadcast freedom and public access to varied viewpoints, the instant case presented no divergence of First Amendment interests.

287. 556 F.2d at 32 (Leventhal, J., dissenting).

288. *Id.* at 37.

289. *Id.* at 16-17.

290. *Id.* at 21 (Bazelon, C.J., concurring).

291. *Id.* at 36 (Leventhal, J., dissenting).

292. *Id.* at 35.

The Supreme Court granted certiorari,[293] and in a five-four decision[294] reversed the court of appeals on both statutory and constitutional grounds. Writing for the majority, Justice Stevens first determined that in issuing its order, the Commission had not engaged in formal rulemaking or the promulgation of regulations. Rather, the Commission had simply adjudicated a dispute limited to the monologue "as broadcast" under 5 U.S.C. § 554(c).[295] This initial determination not only permitted the Court to avoid issuing an advisory opinion, but also served to focus attention on the precise factual context underlying the *Pacifica* litigation.

The Court analyzed the legislative purpose underlying section 326[296] and section 1464,[297] and concluded that the prohibition against censorship contained in section 326 does not so limit section 1464 as to prevent the Commission from applying administrative sanctions against licensees who "engage in obscene, indecent, or profane broadcasting."[298] Justice Stevens next addressed the question of whether the afternoon broadcast of the Carlin monologue was indecent within the meaning of section 1464. Examining the language of the statute, he reasoned that the words "obscene, indecent, or profane," are used in the disjunctive and inferred that each word was intended to have a separate and distinct meaning. Thus, the fact that the Carlin monologue lacked prurient appeal and was therefore not obscene under *Miller*[299] did not preclude its being indecent under section 1464.

The Court rejected Pacifica's contention that the term "indecent" in section 1464 should be interpreted in the same manner as it is under 18 U.S.C. § 1461. Section 1461 prohibits the use of the United States mails to disseminate, *inter alia*, obscene and indecent matter.[300] The

293. 434 U.S. 1008 (1978).

294. 98 S. Ct. 3026 (1978). Justice Stevens delivered the opinion of the Court, joined by Chief Justice Burger and Justices Rehnquist, Blackmun, Powell (Parts I, II, III & IV(C)), and an opinion in which the Chief Justice and Justice Rehnquist joined (Parts IV(A) & IV(B)). Justice Powell filed a concurring opinion, in which Justice Blackmun joined. Justice Brennan, joined by Justice Marshall, filed a dissenting opinion. Justice Stewart filed a separate dissenting opinion in which Justices Brennan, White and Marshall joined.

295. *Id.* at 3032. Section 554(e) provides: "The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty." 5 U.S.C. § 554(e) (1976).

296. *See* note 273 *supra*.

297. *See* note 253 *supra*.

298. 98 S. Ct. at 3035. This conclusion is supported by the fact that the two sections, now separate, had together previously formed § 29 of the Radio Act of 1927.

299. *See* note 278 *supra*.

300. 18 U.S.C. § 1461 (1970). Pacifica argued that the Court's interpretation of § 1461 in Hamling v. United States, 418 U.S. 87 (1974), which had subsumed "indecent" under the

two statutes were distinguished on the basis of their subject matter; section 1461 involves printed matter whereas section 1464 relates solely to broadcasting. Finding no controlling definition of "indecent," Justice Stevens concluded that there was no basis for disagreeing with the Commission's determination that the language used in the afternoon broadcast was indecent and therefore subject to sanction.[301]

Having resolved the statutory issues, Justice Stevens' opinion turned to the constitutional challenges raised by Pacifica. This section of the opinion did not command the support of Justices Powell and Blackmun.[302] In reviewing the claim that the Commission's order was overbroad and encompassed constitutionally protected speech, Justice Stevens observed that the Court's scope of review was limited to the issue of whether the Commission had the authority to prohibit this particular broadcast.[303] He pointed out that the order was properly limited to a specific factual situation, and asserted that "indecency is largely a function of context—it cannot be adequately judged in the abstract."[304] Admitting that the order might lead to some self-censorship by broadcasters and that the particular language of the Carlin monologue might be protected when used in some other context, Justice Stevens argued that the seven indecent words "surely lie at the periphery of First Amendment concern."[305] The issues having been narrowed to the question of whether "the First Amendment prohibits all governmental regulation that depends on the content of speech,"[306] Justice Stevens proceeded to determine that speech of the sort contained in the broadcast "is not entitled to absolute constitutional protection under all circumstances."[307] Justices Powell and Blackmun did not share the

concept of obscenity, should be controlling. Without disputing that interpretation of *Hamling*, Justice Stevens found it inapplicable to the present case. 98 S. Ct. at 3035-36.

301. *Id.* at 3036.

302. In failing to receive the support of Justices Powell and Blackmun, who did not join Parts IV (A) and (B) of the opinion, Justice Stevens spoke only for a plurality of the Court in his discussion of the constitutional issues. Part IV (C) of Justice Stevens' opinion, which Justices Powell and Blackmun did join, emphasized that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection." *Id.* at 3040.

303. *Id.* at 3037.

304. *Id.*

305. *Id.* (citing Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (commercial speech); Young v. American Mini Theatres, 427 U.S. 50 (1976) (adult films)).

306. 98 S. Ct. at 3038.

307. *Id.* at 3039. *See, e.g.*, Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (commercial speech); Young v. American Mini Theatres, 427 U.S. 50 (1976) (adult films); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (libel of private citizen); Miller v. California, 413 U.S. 15 (1973) (obscenity); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (libel of

plurality view that content can be used to determine which speech is more "valuable" and therefore more deserving of First Amendment protection.[308] They did agree, however, that the result in *Pacifica* should turn on the context of the speech at issue.[309]

Justice Stevens, again writing for a majority of the Court, examined the basis for the Commission's conclusion that the special characteristics of the broadcast medium permit the imposition of restrictions on the use of language such as that contained in the Carlin monologue.[310] He agreed with the Commission that broadcasting has a pervasive influence on American life and observed that the listeners' ability to turn off broadcasts of objectionable material is an insufficient means of protecting the privacy of the home from unwanted and objectionable programing.[311] He characterized this answer to the problem as being akin to "saying that the remedy for an assault is to run away after the first blow."[312] In reversing the court of appeals, the majority also relied on the unique accessibility of broadcasts to children. This ease of access was found to "amply justify special treatment of indecent broadcasting."[313]

Justice Brennan, joined by Justice Marshall, filed a strongly-worded dissent in which he argued that the Court's decision validates a process "of governmental homogenization of radio communications"[314] and "permits majoritarian tastes completely to preclude a protected message from entering the homes of a receptive, unoffended minority."[315] Reiterating Chief Judge Bazelon's argument,[316] Justice Brennan contended that listeners who find such language offensive can turn the radio off with a minimum amount of effort.[317] He argued that

public official); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (fighting words); Schenck v. United States, 249 U.S. 47 (1919) (clear and present danger).

308. 98 S. Ct. at 3046 (Powell, J., joined by Blackmun, J., concurring).

309. *Id.* at 3047. *See* note 313 *infra*.

310. *See* note 255 and accompanying text *supra*.

311. 98 S. Ct. at 3040.

312. *Id.*

313. *Id.* at 3040-41. In agreeing with the majority's conclusion, Justice Powell stated: "The result turns . . . on the unique characteristics of the broadcast media, combined with society's right to protect its children from speech generally agreed to be inappropriate for their years, and with the interest of unwilling adults in not being assaulted by such offensive speech in their homes." *Id.* at 3047 (Powell, J., concurring, joined by Blackmun, J.).

314. *Id.* at 3048 (Brennan, J., dissenting).

315. *Id.* at 3049.

316. *See* notes 280-86 and accompanying text *supra*.

317. 98 S. Ct. at 3049 (Brennan, J., dissenting). Although agreeing that the individual's privacy interests in his home are substantial, Justice Brennan stated that "an individual's actions in switching on and listening to communications transmitted over the public airways and directed to the public at-large do not implicate fundamental privacy interests, even

the availability of this alternative justifies preserving the broadcaster's right to disseminate and its listeners' right to receive offensive but nonetheless constitutionally protected messages, especially since the effect of the Court's decision is to replace individual choice as to what is heard with governmental regulation of program content.[318]

Justice Brennan found the majority's reliance on the unique accessibility of broadcasts to children[319] equally unpersuasive. In his view, the Carlin monologue could not be considered obscene even as to the children.[320] The majority decision could therefore result in the screening from adults of material which could not constitutionally be kept from children.[321] And even conceding that most parents would not want their children to hear language such as that contained in the broadcast at issue, Justice Brennan observed that this decision properly resides with the parents and not in the government acting *in loco parentis*.[322] Addressing the majority's contention that the ideas embodied in the Carlin monologue could just as well have been expressed with less offensive language,[323] Justice Brennan cited Justice Harlan's opinion for the Court in *Cohen v. California*[324] for the proposition that restricting the use of certain words creates a substantial risk that the ideas those words convey will concurrently be restricted.[325]

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when engaged in within the home. Instead, because the radio is undeniably a public medium, these actions are more properly viewed as a decision to take part, if only as a listener, in an ongoing public discourse." *Id.* at 3048 (citing Note, *Filthy Words, the FCC, and the First Amendment: Regulating Broadcast Obscenity*, 61 VA. L. REV. 579, 618 (1975)).

318. 98 S. Ct. at 3049 (Brennan, J., dissenting).

319. *See* note 313 and accompanying text *supra*.

320. 98 S. Ct. at 3050 (Brennan, J., dissenting). *See* Erznoznik v. City of Jacksonville, 422 U.S. 205, 213-14 & n.10 (1975).

321. 98 S. Ct. at 3050 (Brennan, J., dissenting). *See* Butler v. Michigan, 352 U.S. 380, 383-84 (1957) (state may not restrict adults to reading only what is appropriate for children). This fear is valid only insofar as the FCC would fail to limit its prohibition against the broadcasting of "indecent" language to those hours when children are likely to be in the listening audience. *See* notes 261-62 and accompanying text *supra*.

322. 98 S. Ct. at 3051 (Brennan, J., dissenting). Justice Brennan noted that this substitution of governmental authority for parental discretion distinguished *Pacifica* from the Court's prior decisions in Wisconsin v. Yoder, 406 U.S. 205 (1972) and Pierce v. Society of Sisters, 268 U.S. 510 (1925). Although the majority stressed the principle that parents have a right to raise their children as they see fit, *see* 98 S. Ct. at 3040, Justice Brennan observed that the majority decision actually deprives parents of that right by giving what would otherwise be a parental responsibility to screen media programming to a government agency. *Id.* at 3051 (Brennan, J., dissenting).

323. *Id.* at 3037 n.18.

324. 403 U.S. 15 (1971).

325. "[W]ords are often chosen as much for their emotive as their cognitive force." *Id.* at 26. And as Justice Brennan explained: "The idea that the content of a message and its potential impact on any who might receive it can be divorced from the words that are the

The concluding portion of Justice Brennan's dissenting opinion charged the majority with falling victim to an "acute ethnocentric myopia."[326] He accused the majority of failing to acknowledge that the supposedly offensive language at issue in *Pacifica* is in fact "the stuff of everyday conversations" in many of America's subcultures.[327] Thus, Justice Brennan concluded that when viewed in a broad perspective, the decision was "another of the dominant culture's inevitable efforts to force those groups who do not share its mores to conform to its way of thinking, acting, and speaking."[328]

In a dissenting opinion joined by Justices Brennan, White and Marshall, Justice Stewart criticized the majority's resolution of the question of whether broadcasting is entitled to less First Amendment protection than other forms of speech.[329] Justice Stewart would not have reached the constitutional issues since, in his view, the Court should not have construed "indecent" as having a broader meaning than "obscene."[330] He would have followed the Court's decision in *Hamling v. United States*[331] and held that "Congress intended, by using the word 'indecent' in section 1464, to prohibit nothing more than obscene speech."[332] In the view of the four dissenting justices, the term "indecent" should therefore have been construed for purposes of section 1464 as it had been in *Hamling*, with the result that the Carlin monologue—concededly not appealing to prurient interests—would not have been stripped of its First Amendment protections.

B. Analysis

The Court's *Pacifica* decision can best be analyzed by a two-part consideration. The sections that follow will examine the reasoning underlying the majority's rejection of both the statutory and constitutional challenges to the Commission's order. They will also analyze whether the Court's judgment is consistent with prior decisions concerning the constitutionally permissible extent of regulation of protected speech.

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vehicle for its expression is transparently fallacious. A given word may have a unique capacity to capsule an idea, evoke an emotion, or conjure up an image." 98 S. Ct. at 3053 (Brennan, J., dissenting).

326. *Id.* at 3054.

327. *Id.*

328. *Id.* (citing Moore v. East Cleveland, 431 U.S. 494, 506-11 (1977)).

329. 98 S. Ct. at 3055-57. (Stewart, J., dissenting).

330. *Id.* at 3056.

331. 418 U.S. 87 (1974). *Hamling* held that the term "indecent" in 18 U.S.C. § 1461 has the same meaning as "obscene" under the Court's decision in Miller v. California, 413 U.S. 15 (1973). *See* note 278 *supra*.

332. 98 S. Ct. at 3056 (Stewart, J., dissenting) (footnote omitted).

1. The Statutory Claims

Circuit Judge Tamm, author of the court of appeals decision, construed 47 U.S.C. § 326[333] to prohibit the FCC from interfering with licensee discretion in programming. He cited prior FCC and federal court cases which he argued established an agency practice of relying on each licensee's judgment regarding program content.[334] This argument is also supported by *Jack Straw Memorial Foundation*,[335] wherein the Commission held that the decision whether or not to broadcast obscene or indecent language should be left to the licensee. That case involved the broadcasting of admittedly obscene language which was part of a recording entitled "Murder at Kent State." The licensee broadcast the language based on his decision that it was necessary in the context of the recording. The Commission found this exercise of licensee discretion to be in conformity with its standards.[336]

Judge Tamm also noted that the section 326 prohibition against FCC interference with licensee judgement as to programming content had been affirmed by the courts as well as by administrative rulings.[337] He found additional support for his contention that licensee discretion should be preserved in the language of the Commission's clarification memorandum regarding the original order.[338] He pointed out that the memorandum acknowledged that (1) some live news coverage of public events involves broadcasting offensive speech in circumstances which preclude journalistic editing, and (2) licensees who broadcast such language should not be subject to Commission discipline.[339] The Commission had therefore once again deferred to the judgment of individual licensees with respect to programming content.

In his concurring opinion, Chief Judge Bazelon noted his agreement with Judge Tamm's section 326 argument and asserted that the Commission's action in "channeling" broadcasts of indecent language into certain hours amounted to censorship.[340] He pointed to repeated

333. *See* note 273 *supra*.

334. 556 F.2d at 14-15 (1977).

335. 29 F.C.C.2d 334 (1971).

336. *Id.* at 354.

337. 556 F.2d at 14. *See, e.g.*, Writers Guild of America, West. Inc. v. FCC, 423 F. Supp. 1064 (C.D. Cal. 1976); Anti-Defamation League of B'Nai B'Rith v. FCC, 403 F.2d 169 (1968), *cert. denied*, 394 U.S. 930 (1969).

338. 59 F.C.C.2d 892 (1976). *See* notes 268-71 and accompanying text *supra*.

339. 556 F.2d at 14-15.

340. *Id.* at 19 (Bazelon, C.J., concurring). Chief Judge Bazelon found that the § 326 prohibition is not limited to rules and regulations that totally forbid the broadcasting of certain matter, but also bars any form of Commission censorship. He argued that "channeling may have substantially the same effect as an absolute ban." *Id.*

FCC abuses of its limited authority to regulate constitutionally protected speech as one basis for his opposition to any weakening of section 326.[341] In the collective view of Chief Judge Bazelon and Judge Tamm, the FCC order in *Pacifica* violated the prohibition against censorship contained in section 326 by permitting the imposition of sanctions for the broadcasting of the language at issue.

Writing for a majority of the Supreme Court, Justice Stevens agreed that section 326 bars the Commission from editing proposed broadcasts in advance. He asserted, however, that this prohibition had never operated to deny the Commission power to review the content of completed broadcasts or to take note of the nature of past programs when considering license renewal applications.[342] He further noted that judicial and administrative interpretations of section 326 have developed the view that its anti-censorship provision does not apply to the broadcasting of obscene, indecent or profane language.[343] In analyzing this point of disagreement between the Supreme Court and the court of appeals, it should be noted that the Commission's order did not merely examine the past programming of one radio station. Instead, it established a new standard for determining permissible language and put broadcasters on notice that the language at issue in *Pacifica* was not to be broadcast during certain hours. While it might be argued that such a decree does not amount to pre-broadcast censorship, it creates the possibility of an even more dangerous situation, one in which broadcasters censor themselves by excising protected as well as unprotected speech due to excessive caution.[344]

The second statutory issue in *Pacifica* concerned the interpretation of 18 U.S.C. § 1464[345] and the question of whether the terms "obscene" and "indecent" have separate meanings.[346] This problem arises in many situations involving the regulation of obscene language, due to the practice of including a string of generic terms in obscenity statutes. Thus, 18 U.S.C. § 1461 prohibits the mailing of "obscene, lewd, lascivious, indecent, filthy or vile" articles and 18 U.S.C. § 1464 prohibits the broadcasting of "obscene, indecent, or profane language." As a consequence of this practice, the question arose as to whether the terms following "obscene" in these and similar statutes are subsumed under the

341. *Id.* at 19 n.1.
342. 98 S. Ct. at 3033.
343. *Id.* at 3034.
344. Justice Stevens admitted that the Commission order created the possibility of self-censorship. *See id.* at 3037.
345. *See* note 253 *supra.*
346. 98 S. Ct. at 3035-36.

parameters of that which is obscene or are meant to establish additional limitations.

Pacifica argued that unless the term "indecent" in section 1464 was held to mean only "obscene," the statute would be unconstitutionally vague and overbroad.[347] This contention was based on the premise that the Supreme Court had defined obscenity in *Miller v. California*,[348] and had subsequently made it clear in *Hamling v. United States*[349] and *United States v. 12 200-Ft. Reels of Super 8mm Film*[350] that the use of the term "indecent" in federal criminal statutes must be construed to refer only to materials involving the specific types of explicit conduct set forth in *Miller*.[351] In *12 200-Ft. Reels of Film*, the Court suggested that the term "indecent" should be understood as referring only to representations or depictions of "hard core" sexuality:

> If and when . . . a "serious doubt" is raised as to the vagueness of the words "obscene," "lewd," "lascivious," "filthy," "*indecent*," or "immoral" as used to describe regulated material in . . . 18 U.S.C. § 1462 . . . *we are prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific "hard core" sexual conduct given as examples in Miller v. California* . . . .[352]

The Court in *Miller* had offered the following examples of speech that could constitutionally be regulated: "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated; (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."[353] Pacifica argued that it followed from these standards established by the Court that the Carlin monologue was not obscene, since it neither appealed to the prurient interest nor lacked literary or political value.[354] Consequently, the argument concluded, the monologue was entitled to constitutional protection and the Commission's order should be adjudged overbroad.[355]

In his concurring opinion, Chief Judge Bazelon accepted Pacifica's overbreadth argument. He noted that the Commission's test for "indecency" did not consider the language at issue in light of the "local com-

347. 556 F.2d at 12.
348. 413 U.S. 15 (1973). *See* note 278 *supra*.
349. 418 U.S. 87 (1974). *See* note 331 *supra*.
350. 413 U.S. 123 (1973).
351. *See* note 278 *supra*.
352. 413 U.S. at 130 n.7 (emphasis added).
353. 413 U.S. at 25.
354. *See id.* at 24.
355. 556 F.2d at 18.

munity standards" impliedly required by *Miller*, but rather used "contemporary community standards for the broadcast medium" as its touchstone.[356] Chief Judge Bazelon pointed out that the Commission's indecency standard also ignored the *Miller* requirement that a work be judged as a whole, and that it must appeal to prurient interests to be considered obscene.[357] He noted that the FCC standard would preclude the broadcasting of indecent language despite the fact that the overall work contained literary, artistic, political or scientific value.[358] Consequently, Chief Judge Bazelon concluded that the definition of "indecency" in the Commission's order could be upheld only if "there exists an additional category of offensive speech that is unprotected when broadcast."[359]

Chief Judge Bazelon's conclusion was prophetic, in that the Supreme Court subsequently did carve out such an additional category of unprotected speech in *Pacifica*. Writing for the majority, Justice Stevens found that "indecency" was not subsumed under the definition of "obscene." He refined the appeal to prurient interest standard enunciated in *Miller*[360] by holding that indecency "merely refers to nonconformance with accepted standards of morality."[361] Responding to the argument that the conclusion in *Hamling* that section 1461's proscription was limited to language falling within the *Miller* definition of obscenity[362] was controlling, Justice Stevens distinguished that case on the basis of the different form of media involved there. Since section 1461 concerns printed matter sent by mail, he reasoned that the construction placed on it by the Court was inapplicable to a statute such as section 1464, which deals with public broadcasting.[363] Pacifica's reliance on *12 200-ft. Reels of Film* was dismissed as being based on dicta.[364]

Writing for four members of the Court,[365] Justice Stewart rejected the majority's interpretation of section 1464. He argued that this con-

356. *Id.* at 22 (Bazelon, C.J., concurring) (citing 51 F.C.C.2d at 433).

357. 556 F.2d at 23 (Bazelon, C.J., concurring). *See* 413 U.S. at 24

358. 556 F.2d at 23 (Bazelon, C.J., concurring). All of these criteria were enunciated in *Miller*. *See* note 278 *supra*.

359. 556 F.2d at 24 (Bazelon, C.J., concurring).

360. *See* 413 U.S. at 24.

361. 98 S. Ct. at 3035 (footnote omitted). The Court's adoption of this definition raises several questions, such as what constitutes "nonconformance," whose standards of morality are to be considered "accepted," and how these standards are to be communicated to broadcasters.

362. *See* note 331 *supra*.

363. 98 S. Ct. at 3036 & nn.16-17.

364. *Id.* at 3035.

365. Justice Stewart was joined by Justices Brennan, White and Marshall.

struction of the statute was plausible but "by no means compelled," and that "indecent" should be defined to mean "no more than 'obscene.' "[366] Justice Stewart agreed with Pacifica that the decision in *Hamling* was dispositive of the section 1464 interpretation issue. He noted that the *Hamling* Court had limited section 1461 so as to proscribe only those representations or descriptions of hard core sexual conduct set out in *Miller*.[367] Justice Stewart could find no adequate basis for the majority's conclusion that the term "indecent" had different meanings in each of these statutes. He concluded by noting that although sections 1461 and 1464 were enacted separately, they were codified together in the 1948 Criminal Code under the chapter entitled "Obscenity," which suggested that Congress intended that section 1464, like section 1461, should prohibit only obscene speech.[368]

2. The Constitutional Claims

The Supreme Court produced a majority decision in resolving the statutory issues in *Pacifica*. The constitutional questions, however, fragmented the Court. Most of Justice Stevens' constitutional discussion did not command the support of a majority of the Court, but was joined only by Justice Rehnquist and Chief Justice Burger. Justice Powell wrote a separate concurring opinion, joined by Justice Blackmun, which set forth his disagreement with certain of the conclusions reached by Justice Stevens. Justice Brennan, joined by Justice Marshall, filed a bitter dissenting opinion in which he addressed the constitutional issues.[369]

For Justice Brennan to serve as a spokesman for the dissenters in a Supreme Court obscenity decision is a significant indication of the shifting tides of interpretation in this area of constitutional law. Justice Brennan wrote the majority opinion in *Roth v. United States*,[370] wherein the Court first promulgated a uniform standard for determining what speech is obscene. He also authored the plurality opinion in *Memoirs v. Massachusetts*,[371] which further refined the *Roth* standard. By 1973, however, the composition of the Court had changed, and Jus-

366. 98 S. Ct. at 3056 (Stewart, J., dissenting).

367. *Id.* *See* note 353 and accompanying text *supra*.

368. *Id.* at 3056 (Stewart, J., dissenting).

369. Justices Stewart and White expressed no opinion regarding the merits of the constitutional issues in *Pacifica*. They believed that the construction of § 1464 set out in Justice Stewart's dissenting opinion, *see* notes 366-68 and accompanying text *supra*, made a constitutional analysis unnecessary.

370. 354 U.S. 476 (1957).

371. 383 U.S. 413 (1966).

tice Brennan found himself in the minority when *Miller* was decided. He also dissented in *Paris Adult Theatre I v. Slaton*,[372] and urged the Court to abandon its quest for a viable definition of "obscenity," at least insofar as consenting adults were concerned.[373] Justice Brennan continued to fill the role of minority spokesman in *Pacifica*.

The first of the two constitutional questions considered by Justice Stevens' plurality opinion was whether the Commission's order was overbroad in that it permitted the imposition of sanctions on the broadcasting of constitutionally protected speech. Justice Stevens began by noting that the Court's review of the order was limited to the question of whether it was appropriate in the specific factual context of the case.[374] Although acknowledging that the order may cause some broadcasters to engage in self-censorship, he asserted that this will only occur in situations where the material to be broadcast contains "patently offensive references to excretory and sexual organs and activities."[375] Such self-censorship, he argued, will not significantly affect the content of serious communication because "[t]here are few, if any, thoughts that cannot be expressed by the use of less offensive language."[376] Justice Stevens therefore concluded that invalidating the FCC order solely to preserve "the vigor of patently offensive sexual . . . speech" was unwarranted.[377]

The second constitutional question which the plurality addressed was whether the First Amendment precludes the government from punishing the public broadcast of indecent language under any circumstances. Justice Stevens acceded to the principle that the First Amendment requires the government to "remain neutral in the marketplace of ideas," but he argued that the speech at issue in *Pacifica* was not an essential part of that marketplace.[378] In Justice Stevens' view, the question was not whether the Carlin monologue was protected speech under any circumstances, but rather whether it warranted protection under the circumstances in which it was broadcast. Thus, although the Commission itself recognized that the monologue had some literary and po-

372. 413 U.S. 49 (1973).

373. *Id.* at 84-85 (Brennan, J., dissenting).

374. 98 S. Ct. at 3037 (plurality opinion).

375. *Id.* (footnote omitted).

376. *Id.* at n.18.

377. *Id.* at 3037.

378. *Id.* at 3038-39: "These words offend for the same reasons that obscenity offends." (Footnote omitted). It is difficult to reconcile this statement with Justice Stevens' attempt to delineate how the term "indecency" has a separate meaning apart from the concept of "obscenity." *See* notes 297-98 and accompanying text *supra*.

litical value and expressed a point of view, its objection focused on the manner in which that view was expressed.[379] Justice Stevens concluded this analysis by noting that since the content of the broadcast at issue was "vulgar," "offensive" and "shocking," the Court was required to examine the context of its dissemination to determine whether the Commission's actions were constitutional.[380]

As previously noted, Justices Powell and Blackmun did not join in the foregoing constitutional analysis. Justice Powell expressed his disagreement with the plurality because he could not "subscribe to the theory that the Justices of this Court are free generally to decide on the basis of its content which speech protected by the First Amendment is most 'valuable' and hence deserving of the most protection, and which is less 'valuable' and hence deserving of less protection."[381] In his dissenting opinion, Justice Brennan also voiced dissatisfaction with the analysis utilized in Justice Stevens' plurality opinion. He noted that a majority of the Court had rejected the notion "that the degree of protection the First Amendment affords protected speech varies with the social value ascribed to that speech by five Members of this Court."[382] Justice Brennan also took issue with the plurality's assertion that the FCC order would not chill free expression because language such as that at issue in *Pacifica* is unnecessary to serious communication.[383] He found it "fallacious" to presume that the content of a message could be divorced from the language used to express it.[384]

The only constitutional question on which the Court produced a majority opinion was whether the unique characteristics of the broadcast medium warranted a lower level of First Amendment protection. True to Chief Judge Bazelon's suggestion,[385] the Supreme Court answered this question in the affirmative. Writing for a majority on this issue, Justice Stevens noted that of all forms of communication, broad-

379. 98 S. Ct. at 3038-39 & n.22 (plurality opinion).

380. *Id.* at 3039. It is important to note that these constitutional questions were not resolved by a majority of the Court. Justice Stevens' discussion of these issues is therefore of only limited precedential value.

381. *Id.* at 3046 (Powell, J., concurring). Justices Powell and Blackmun did concur with Justice Stevens' resolution of the statutory issues and in the judgment of the Court. *See* note 313 *supra.*

382. 98 S. Ct. at 3047 (Brennan, J., dissenting) (citing *id.* at 3046-47 (Powell, J., concurring)). *Accord*, Young v. American Mini Theatres, 427 U.S. 50 (1976).

383. *Id.* at 3053 (Brennan, J., dissenting). *See* notes 375-76 and accompanying text *supra.*

384. *Id.* at 3053 (Brennan, J., dissenting). *See* notes 322-25 and accompanying text *supra. Accord*, Cohen v. California, 403 U.S. 15, 25-26 (1971) (opinion of Harlan, J.).

385. *See* text accompanying note 359 *supra.*

casting has received "the most limited First Amendment protection."[386] He advanced two justifications for this disparate treatment: 1) broadcasting has "established a uniquely pervasive presence in the lives of all Americans," jeopardizing individual privacy rights; and 2) broadcasting is "uniquely accessible to children," which implicates the government's interest in the "well being of its youth" and warrants greater regulation of this particular form of communication.[387] Justice Powell's concurring opinion also stressed the effect the broadcast media has on children and emphasized that this was a significant factor in his joining Justice Stevens' opinion to create a majority.[388] He noted that "[t]he language involved in this case is as potentially degrading and harmful to children as representations of many erotic acts."[389]

The Supreme Court in *Pacifica* delineated another category of speech, broadcasting, that is entitled to only limited First Amendment protection.[390] Although the majority attempted to limit its holding to a specific factual context,[391] its reasoning would seem to leave open the possibility of further expanding the Commission's power to regulate the broadcasting of "indecent" speech.[392] The decision evinces increasing concern for individual privacy rights and the need to shield children from expression viewed as inappropriate for them.[393] If in the future the Commission finds that "indecent" language was broadcast at

386. 98 S. Ct. at 3040.

387. *Id.*

388. *Id.* at 3044-45 (Powell, J., concurring).

389. *Id.* at 3045. Justice Powell also noted that broadcasting implicates fundamental privacy interests of the individual in his home. In his view, this factor justifies broadcasting regulations that would be constitutionally impermissible if imposed upon other forms of media. *See id.* at 3045-46. For Justice Brennan's response to the majority's rationale for extending less First Amendment protection to the broadcast media, *see* notes 314-22 and accompanying text *supra*.

390. 98 S. Ct. at 3040. Justice Stevens argued that "indecent" speech lies "at the periphery of First Amendment concern," *id.* at 3037, but this part of his opinion was joined only by Chief Justice Burger and Justice Rehnquist. *See id.* at 3046-47 & n.4 (Powell, J., concurring). The result in *Pacifica* actually turned on the unique characteristics of the broadcast media. *See id.* at 3040-41 (majority opinion), 3047 (Powell, J., concurring). For other categories of speech that are entitled to only limited First Amendment protection, *see, e.g.*, Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (commercial speech); Young v. American Mini Theatres, 427 U.S. 50 (1976) (adult films).

391. *See* 98 S. Ct. at 3041 (majority opinion), 3047 (Powell, J., concurring).

392. *See id.* at 3051-52 (Brennan, J., dissenting). Justice Brennan suggested that the absence of "principled limits" on the Commission's power in this area could lead to "the cleansing of public radio of any 'four-letter words' whatsoever, regardless of their context." *Id.* at 3051. He pointed out that this might result in the banning from radio of noted literary works, political speech and portions of the Bible. *Id.* at 3051-52.

393. *See id.* at 3040-41 (majority opinion), 3044-46 (Powell, J., concurring).

a time when children were likely to be in the listening audience,[394] the Court's rationale in deciding *Pacifica* would justify the imposition of criminal sanctions or other punishment on the disseminator.

III. The Clergy and the Right to Hold Public Office: *McDaniel v. Paty*

The Supreme Court in *McDaniel v. Paty*[395] considered, but failed fully to clarify, the scope of religious freedom under the First Amendment.[396] The question posed in *McDaniel* was whether the state of Tennessee could bar an individual from seeking an elective position solely because of his status as a practicing minister. The decision in *McDaniel* reveals a Court united in agreement that the Tennessee provision was unconstitutional but divided over the legal basis for that conclusion.

A. The Decision

Paul McDaniel, a Baptist minister, was a candidate for a position as a delegate to the 1977 Tennessee constitutional convention. An opponent, Selma Cash Paty, sued in State Chancery Court for a judgment declaring McDaniel disqualified from serving as a delegate to the convention. The basis for her claim was a Tennessee statute which barred ministers from seeking this position.[397] The Chancery Court held that the statute violated the First and Fourteenth Amendments of the United States Constitution and declared McDaniel an eligible candidate. In the subsequent election, he was elected by a large margin. After the election, however, the Tennessee Supreme Court reversed the

394. *See* note 261 and accompanying text *supra*.

395. 435 U.S. 618 (1978). Last term the Court also decided another case relating to freedom of religion, New York v. Cathedral Academy, 434 U.S. 125 (1977). The Court in *Cathedral Academy* held that a New York statute authorizing reimbursement to parochial schools for expenses incurred in performing state-required services during the 1971-72 school year violated the establishment clause of the First Amendment. *See* note 396 *infra*.

396. The First Amendment provides in part that "Congress shall make no law respecting an *establishment* of religion, or prohibiting the *free exercise* thereof." U.S. CONST. amend. I (emphasis added).

397. 1976 Tenn. Pub. Acts ch. 848, § 4: "Any citizen of the state who can qualify for membership in the House of Representatives of the General Assembly may become a candidate for delegate to the convention. . . ." The requirements for membership in the legislature include a specific constitutional limitation on participation by the clergy. This limitation was originally contained in article VIII, § 1 of the 1796 Tennessee Constitution and is now found in article IX, § 1 of the present state constitution: "Whereas Ministers of the Gospel are by their profession, dedicated to God and the care of Souls, and ought not to be diverted from the great duties of their functions; therefore, no Minister of the Gospel, or priest of any denomination whatever, shall be eligible to a seat in either House of the Legislature."

Chancery Court on the ground that the statute imposed no burden upon "religious belief" and restricted "religious action . . . [only] in the law making process of government—where religious action is absolutely prohibited by the establishment clause."[398] The Tennessee Court found a sufficient state interest in maintaining a separation between political and religious activity to warrant the disqualification,[399] notwithstanding the guarantee of the free exercise clause of the First Amendment.[400] The United States Supreme Court noted probable jurisdiction,[401] and subsequently reversed the decision of the Tennessee Supreme Court.

Chief Justice Burger, writing for a plurality of the Court,[402] began his opinion by tracing the history of the practice of disqualifying ministers from legislative office.[403] Drawing from the works of Locke, Jefferson and Madison, the Chief Justice reviewed the historical debate over the necessity of excluding ministers from such positions.[404] He concluded this review by noting that of the thirteen states which originally disqualified members of the clergy, only two, Maryland and Tennessee, continued this ban into the twentieth century.[405] In 1974, Maryland's statute was found unconstitutional as an infringement of the free exercise of religion by a federal district court,[406] leaving Tennessee as the only state maintaining a bar on clergy holding public office. Despite this singular position, the Tennessee statute came to the Court with the full support of the state's legislative and judicial branches, a posture recognized as supplying a presumption of validity which the Court did not summarily reject.

Notwithstanding this presumption, the plurality found that by conditioning McDaniel's right to seek public office on the surrender of his right to perform religious functions, Tennessee had impermissibly encroached upon his free exercise of religion.[407] Chief Justice Burger reached this conclusion by relying on the Court's decision in *Sherbert v. Verner*.[408] The Court in *Sherbert* held that a state's refusal to grant

398. Paty v. McDaniel, Tenn., 547 S.W.2d 897, 903 (1977).
399. *Id.* at 905.
400. *See* note 396 *supra*.
401. 432 U.S. 905 (1977) (*mem*).
402. 435 U.S. 618 (1978). The Chief Justice was joined by Justices Powell, Rehnquist and Stevens. Justice Blackmun took no part in the consideration or decision of the case.
403. *See generally* 1 A. STOKES, CHURCH AND STATE IN THE UNITED STATES (1950).
404. 435 U.S. at 622-25.
405. *Id.* at 625.
406. Kirkley v. Maryland, 381 F. Supp. 327 (D. Md. 1974).
407. 435 U.S. at 626.
408. 374 U.S. 398 (1963).

unemployment benefits to an individual who was unable to find work because her religious beliefs prohibited her from working on Saturdays imposed an unconstitutional burden on the free exercise of religion.[409] The Chief Justice distinguished the instant case from the Court's decision in *Torcaso v. Watkins*,[410] reasoning that *Torcaso* struck down a requirement limiting religious *belief*, whereas the Tennessee statute pertained to religious *conduct* or *activity*.[411] Focusing on McDaniel's *status* as a minister, the plurality concluded that the free exercise clause's "absolute prohibition of infringements on the 'freedom to believe' [was] inapposite here."[412]

Because an infringement upon First Amendment values had been found, Chief Justice Burger scrutinized the state interests claimed to justify the ban on ministers holding public office.[413] The state had argued that granting ministers the right to hold office would result in their exercise of legislative power and influence to promote the interests of one particular sect, thus pitting one sect against another and adding destructive religious conflict to the already difficult task of running a state government.[414] The plurality was not persuaded by these asserted justifications and found that Tennessee had failed to establish that the historically based view of the dangers of clergy participation in the political processes had contemporary validity.[415] Consequently, the Court held the Tennessee statute violative of the First Amendment right to the free exercise of religion.[416]

Justice Brennan filed a lengthy concurring opinion[417] in which he argued that the decision in *Torcaso*[418] should be controlling. He re-

409. *Id.* at 403-06.

410. 367 U.S. 488 (1961). In *Torcaso* the Court invalidated a Maryland constitutional requirement that applicants for public office declare their belief in God. The Court held that this test violated the freedom of belief and religion guaranteed by the First and Fourteenth Amendments. *Id.* at 496.

411. 435 U.S. at 627 (footnote omitted).

412. *Id.*

413. Chief Justice Burger cited Wisconsin v. Yoder, 406 U.S. 205, 215 (1972), for the proposition that "[t]he essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." 435 U.S. at 628 & n.8. In his concurring opinion, Justice Brennan questioned this reliance. *See id.* at 635 n.8 (Brennan, J., concurring).

414. Paty v. McDaniel, Tenn., 547 S.W.2d at 904-06. The Tennessee Supreme Court referred to the religious wars in Ireland and Lebanon as examples "that the human race has not advanced to a degree of civilization that will permit us to conclude that the fervor of religion will never again disturb and disrupt secular affairs and government." *Id.* at 906.

415. McDaniel v. Paty, 435 U.S. at 629.

416. *Id.*

417. Justice Brennan was joined by Justice Marshall.

418. *See* note 410 *supra*.

jected the distinction relied upon by the plurality between religious belief and religious conduct or activity.[419] Justice Brennan pointed out that "freedom of belief protected by the Free Exercise Clause embraces freedom to profess or practice that belief, even including doing so to earn a livelihood."[420] In addition to the free exercise violation, Justice Brennan found that the Tennessee statute violated the establishment clause.[421] He noted that except in a few, limited situations, government cannot use religion as a basis for imposing "duties, penalties, privileges or benefits."[422] Justice Brennan concluded his opinion by stating his faith in the self-corrective nature of the political process. He asserted that all individuals should have an opportunity to present their views in the "marketplace of ideas" for acceptance or rejection at the polls.[423]

Justice Stewart filed a brief concurring opinion in which he voiced his agreement with Justice Brennan that *Torcaso* should be controlling. He found the differences between the two cases to be without constitutional significance.[424] Justice Stewart rejected the plurality's view that religious status and religious belief are separable for purposes of free exercise analysis.[425] He argued that the Tennessee statute "penalized an individual for his religious status—for what he is and believes in—rather than for any particular act generally deemed harmful to society."[426]

Justice White filed a concurring opinion in which he offered a wholly different rationale for the Court's judgment. He found that the Tennessee statute which absolutely prohibited members of a particular class, in this case ministers, from holding public office, to be in violation of the equal protection clause of the Fourteenth Amendment. Justice White adopted this approach because the plurality and concurring opinions failed to persuade him that McDaniel's free exercise of religion was in any way restricted by the Tennessee statute.[427] Using an equal protection analysis, however, Justice White concluded that the state's interests were insufficient to warrant excluding the affected class.[428] This conclusion was further supported by his finding that the

419. 435 U.S. at 634 (Brennan, J., joined by Marshall, J., concurring). *See* notes 410-12 and accompanying text *supra*.

420. 435 U.S. at 631 (Brennan, J., joined by Marshall, J., concurring) (footnote omitted).

421. *See* note 396 *supra*.

422. 435 U.S. at 639 (Brennan, J., joined by Marshall, J., concurring) (footnote omitted).

423. *Id.* at 642.

424. *Id.* at 642-43 (Stewart, J., concurring).

425. *See* notes 410-12 and accompanying text *supra*.

426. 435 U.S. at 643 n.* (Stewart, J., concurring).

427. *Id.* at 643-44 (White, J., concurring).

428. *Id.* at 645: "All 50 States are required by the First and Fourteenth Amendments to

Tennessee statute was both underinclusive and overinclusive.[429]

B. Analysis

The unanimous conclusion reached by the Court in *McDaniel* is not surprising in light of the disappearance of clergy-disqualification statutes elsewhere in the United States.[430] The differences in approach, however, warrant examination. Seven members of the Court[431] believed that the protection afforded by the free exercise clause of the First Amendment compelled the reversal of the judgment of the Tennessee Supreme Court. Beyond this consensus, these justices produced three different opinions; two favored the interpretation of *Torcaso* set forth by Justice Brennan,[432] while the plurality distinguished *Torcaso* and relied on *Sherbert*.[433]

The issue separating these two segments of the Court is how far the scope of the free exercise clause can be extended in the face of legitimate state interests.[434] The view derived from *Torcaso*, that any statute which compels an individual to eschew protected religious practices as a condition of office is unconstitutional,[435] was rejected by a plurality of the Court. The plurality instead found that the Tennessee disqualification provision operated against McDaniel because of his *status* as a minister.[436] Stating that the meaning of "minister" or "priest" is a

maintain a separation between church and state, and yet all of the States other than Tennessee are able to achieve this objective without burdening ministers' rights to candidacy. This suggests that the underlying assumption on which the Tennessee statute is based—that a minister's duty to the superiors of his church will interfere with his governmental service—is unfounded."

429. *Id.* Justice White pointed out that the statute was underinclusive in that its limitations did not apply to executive and judicial office-seekers. He found the statute to be overinclusive since it also applied to ministers whose religious beliefs would not interfere with the proper discharge of the duties of a delegate to the constitutional convention.

430. *See* notes 405 & 406 and accompanying text *supra*. The decision in *McDaniel* technically leaves intact the Tennessee Constitution's bar on clergy serving as legislators, since only the statute relating to constitutional convention delegates was invalidated by the Court. 435 U.S. at 629. The decision in *McDaniel* nonetheless casts serious doubt on the constitutional validity of the underlying constitutional prohibition. *See* note 397 *supra*.

431. Chief Justice Burger and Justices Powell, Rehnquist, Stevens, Brennan, Marshall and Stewart.

432. *See* notes 417-20 and accompanying text *supra*.

433. *See* notes 408-12 and accompanying text *supra*.

434. In distinguishing *Torcaso*, the plurality noted that the First Amendment extends absolute protection to freedom of belief, which counsels against expanding the scope of that provision for fear of leaving "government powerless to vindicate compelling state interests." 435 U.S. at 627 n.7.

435. *See id.* at 632 (Brennan, J., concurring, joined by Marshall, J.).

436. *Id.* at 626-27. *See* notes 410-12 and accompanying text *supra*.

question of state law,[437] the plurality interpreted the available authority as indicating that "ministerial status is defined in terms of conduct and activity rather than in terms of belief."[438] Based on this reading of state authority, the plurality concluded that the Tennessee statute's limitation was different from that in *Torcaso* which specifically limited the right to hold public office to those who professed belief in God.[439]

Justice Brennan argued that the Court had no justification for equating "status" with "activity." Referring to the fact that Torcaso's refusal to declare a belief in God was viewed by the plurality as an act based on religious belief whereas McDaniel's performance of the functions of a minister were not so considered,[440] he stated: "I simply cannot fathom why the Free Exercise Clause 'categorically forbids' hinging qualification for office on the *act* of declaring a belief in religion, but not on the act of discussing that belief with others."[441] Justice Brennan's disagreement with the plurality's distinction between belief and activity apparently must await future Court terms for resolution. The absence of a clear-cut guideline on this issue is likely to pose problems for lower courts left in confusion as to what criteria to employ in determining whether certain activity involves freedom of belief so as to command absolute constitutional protection.

The members of the Court who utilized a freedom of religion analysis in *McDaniel* were in agreement regarding both the unconstitutionality of conditioning eligibility for office on the abandonment of religious activity and the support for that conclusion provided by *Sherbert*.[442] In relying on *Sherbert*, however, none of these justices responded directly to the argument relied upon by the lower court that *Braunfeld v. Brown*[443]was controlling. In *Braunfeld*, the Court sus-

437. The plurality simultaneously asserted that they were not bound by the Tennessee court's resolution of the issue, but were only required to consider it. 435 U.S. at 627 n.5.

438. *Id.* at 627 (footnote omitted). For a criticism of this interpretation, see *id.* at 643 n.* (Stewart, J., concurring).

439. *See* note 410 *supra*.

440. *See* 435 U.S. at 626-27.

441. *Id.* at 635 (Brennan, J., concurring, joined by Marshall, J.) (footnote omitted) (emphasis in original). In his concurring opinion, Justice Stewart pointed out that the activity/belief dichotomy, as previously enunciated by the Court in Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940), reflected the Court's judgment that acts claimed to constitute a free exercise of religion were still subject to judicial review so that "acts harmful to society should not be immune from proscription simply because the actor claims to be religiously inspired." 435 U.S. 643 n.* (Stewart, J., concurring). Justice Stewart asserted that McDaniel's disqualification was not based on his acts but rather on his beliefs. *Id.*

442. 435 U.S. at 626 (plurality opinion), 633-34 (Brennan, J., concurring, joined by Marshall, J.).

443. 366 U.S. 599 (1961).

tained a Sunday closing law despite conceding that it necessarily made the practice of religion by Orthodox Jewish merchants more expensive. Their religious beliefs required them to close on Saturday and the state law required them also to close on Sunday, thus resulting in two days of lost business. The *Braunfeld* Court held that the state's interest in having a uniform day of rest justified the "indirect burden" imposed on Orthodox Jews by the closing laws.[444]

The Tennessee Supreme Court had found that the disqualification statute, like the law at issue in *Braunfeld*, imposed only an indirect burden on McDaniel's free exercise of his religious beliefs.[445] It held that this indirect burden was justified by the state's interest in preserving the separation of church and state, an interest even more compelling than that asserted in *Braunfeld*.[446] The Tennessee court distinguished *Sherbert* on the ground that no compelling state interest could be shown in *Sherbert* to warrant the state's denial of unemployment benefits.[447] The failure of any of the opinions in *McDaniel* to respond to the lower court's analysis of *Braunfeld* adds to the lack of standards for the resolution of free exercise questions.

To a certain extent, the "indirect burden" doctrine enunciated in *Braunfeld* was echoed by Justice White in his concurring opinion, in which he chose to adopt an equal protection approach to the issues presented. Justice White felt compelled to analyze the issues in *McDaniel* by reference to the equal protection clause because the plurality had failed "to explain in what way McDaniel has been deterred in the observance of his religious beliefs."[448] He argued that Tennessee's disqualification statute did not interfere with McDaniel's free exercise of religion since the minister was not compelled to abandon the ministry or disavow any of his beliefs.[449] This implicit adoption of the indirect burden doctrine is susceptible to the same criticism made of the *Braunfeld* decision—that there is nothing "indirect" about compelling an individual to choose between the unfettered exercise of one's religious beliefs and the rights and privileges of citizenship, including holding public office.

The various decisions of the justices in *McDaniel* illustrate once again the difficulty the Court has encountered in positing clear guide-

444. *Id.* at 606-07.
445. Paty v. McDaniel, Tenn., 547 S.W.2d at 905.
446. *Id.*
447. *Id.* at 907. *See* notes 408 & 409 and accompanying text *supra*.
448. 435 U.S. at 643 (White, J., concurring).
449. *Id.* at 643-44.

lines for resolving the difficult questions arising under the free exercise and establishment clauses. While the result in *McDaniel* may be satisfactory in that it repudiates a doctrine long rejected by most states, it is unfortunate that the Court was unable to base its decision on a common ground expressed in a single opinion.

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Due Process

I. Marriage and the Family

A. "Best Interests of the Child"

In *Quilloin v. Walcott*,[1] the Supreme Court unanimously upheld the constitutionality of a Georgia statutory scheme which permitted the adoption of an illegitimate child with only the natural mother's consent.[2] In sanctioning the denial of the power to veto such an adoption to the father while granting this right to the mother, the Court applied a "best interests of the child" standard to determine the father's substantive rights. The Court concluded that since the result of the adoption would be to recognize an existing family unit, such a standard was constitutionally permissible.

Leon Quilloin had never married the mother of his son Darrell, and had never sought custody, although he had maintained contact with the child, providing support and gifts from time to time.[3] He was allegedly unaware of a procedure by which an unwed father could legitimate his child;[4] Georgia law provides that such a legitimated child may inherit from a father who has gained parental rights.[5] Darrell's mother married when he was almost three, but Quilloin's visits continued for another eight years until the mother concluded that the contacts were having a disruptive effect on the child.[6] Her husband petitioned

1. 434 U.S. 246 (1978).

2. GA. CODE ANN. § 74-403 (3) (1973) provides: "Illegitimate children—If the child be illegitimate, the consent of the mother alone shall suffice [for adoption]. Such consent, however, shall not be required if the mother has surrendered all of her rights to said child to a licensed child-placing agency, or the Department of Human Resources."

3. 434 U.S. at 251.

4. *Id.* at 251 n.14.

5. GA. CODE ANN. § 74-103 (3013) (1973) provides: "A father of an illegitimate child may render the same legitimate by petitioning the superior court of the county of his residence, setting forth the name, age, and sex of such child, and also the name of the mother; and if he desires the name changed, stating the new name, and praying the legitimation of such child. Of this application the mother, if alive, shall have notice. Upon such application, presented and filed, the court may pass an order declaring said child to be legitimate, and capable of inheriting from the father in the same manner as if born in lawful wedlock, and the name by which he or she shall be known." GA. CODE ANN. § 74-203 (3028) (1973) states: "The mother of an illegitimate child shall be entitled to the possession of the child, unless the father shall legitimate him as before provided. Being the only recognized parent, she may exercise all the paternal [sic] power." The Georgia Supreme Court noted that the word "paternal" was a statutory misprint and was intended to read "parental." Quilloin v. Walcott, 238 Ga. 230, 231, 232 S.E.2d 246, 247 (1977), *aff'd*, 434 U.S. 246 (1978).

6. 434 U.S. at 251 & n.10.

to adopt Darrell, apparently to curtail further visits by Quilloin.[7] In response, Quilloin filed an application for a writ of habeas corpus seeking visitation rights, a petition for legitimation and an objection to the adoption.[8] If he had been successful in legitimizing his son, he would have gained veto power over the adoption proceedings similar to that exercised by divorced fathers.[9]

The trial court consolidated the petitions for adoption, legitimation and writ of habeas corpus, thus providing an opportunity for the natural father to be heard " 'with respect to any issue or other thing upon which he desire[s] . . . , including his fitness as a parent.' "[10] Although the trial court did not find Quilloin unfit as a parent, it denied his petitions and granted the adoption based on a "best interest of the child" standard.[11] On appeal to the Georgia Supreme Court, Quilloin contended that the sections of Georgia's statutory scheme granting exclusive powers over adoption to natural mothers of illegitimate children were unconstitutional because they deprived natural fathers of their parental rights without due process of law and equal protection under the Fourteenth Amendment.[12]

The Georgia Supreme Court relied on *Labine v. Vincent*[13] to find

7. *Id.*

8. *Id.* at 250.

9. *See* note 5 and accompanying text *supra*. In addition, although not a factor in *Quilloin*, GA. CODE. ANN. § 74-101 (3012) (1973) provides that the father of a child born out of wedlock may legitimate the child by marrying the mother and acknowledging the child as his own.

10. 434 U.S. at 250.

11. *Id.* at 251.

12. Quilloin v. Walcott, 238 Ga. 230, 232 S.E.2d 146 (1977), *aff'd*, 434 U.S. 246 (1978).

13. 401 U.S. 532 (1971). *Labine* upheld a Louisiana statutory classification of children on the basis of legitimacy or illegitimacy for the purpose of denying illegitimate children an equal share in the estate of their father. The Louisiana state interests consisted of promoting family life and controlling the disposition of property. Since the father of an illegitimate child could remove the statutory disability by executing a will, the Court found that no "insurmountable barrier" had been created to bar claims by illegitimate children. *Id.* at 539. *Labine*, however, has been substantially narrowed by subsequent Supreme Court decisions. In Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972), the Court struck down a Louisiana workers' compensation law which discriminated against illegitimates seeking to recover for the death of their father as a violation of equal protection under the Fourteenth Amendment. Then, in Trimble v. Gordon, 430 U.S. 762 (1977), the Court invalidated an Illinois statutory scheme which permitted illegitimate children to inherit by intestate succession from their mothers, but not from their fathers. It appears from these more recent decisions that where illegitimate children are denied benefits because of their status, the Court will look at the asserted state interests and the means chosen to further those interests with less deference. Where, however, the *parent* of an illegitimate child is denied a benefit, the Court is likely to reduce the level of its scrutiny. The Court in *Trimble* objected to the legitimacy of a state's attempt to promote family life by imposing sanctions on the *children* of unformalized unions. *Id.* at 769-70. In contrast, in Glona v. American Guar. & Liab. Ins. Co.,

that the classification of children on the basis of legitimacy was valid because it served a strong state interest in ensuring the welfare of children.[14] Such a classification would tend to encourage either marriage or the legitimation of children by natural fathers who were interested in obtaining parental rights.[15] If a father chose not to take either of these steps, statutes vesting exclusive authority in the natural mother to consent to adoption would prevent him from blocking it for frivolous or pecuniary reasons.[16] The Georgia Supreme Court also noted that illegitimate children are most frequently raised by their mothers; it is therefore reasonable to place full parental power in the parent who is present.[17]

Cognizant of the valid state interests in ensuring the welfare of the children and promoting family life, and the availability of a procedure through which unwed fathers could acquire parental rights, the Georgia court held that the statutory scheme did not violate equal protection.[18] The Georgia Supreme Court summarily disposed of the claim of denial of due process by distinguishing *Stanley v. Illinois*,[19] on which Quilloin had relied, on the facts.[20] In *Stanley*, the Supreme Court held unconstitutional an Illinois statute which permitted the state to take custody of children of unwed fathers without a fitness hearing, but granted hearings to divorced and married parents and unwed mothers.[21] The *Stanley* decision required a specific finding of a natural

391 U.S. 73 (1968), the Court applied only a rational basis standard of review to find that a Louisiana law which denied the parent of an illegitimate child the right to sue for damages for the child's wrongful death violated equal protection. It noted that it would be "far-fetched to assume that women have illegitimate children so that they can be compensated in damages for their death." *Id.* at 75.

14. Quilloin v. Walcott, 238 Ga. at 232-33, 232 S.E.2d at 248.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. 405 U.S. 645 (1972).

20. Quilloin v. Walcott, 238 Ga. at 233-34, 232 S.E.2d at 248-49.

21. 405 U.S. at 650-51. The Illinois scheme provided for two ways in which nondelinquent children could be removed from the home of their parents: (1) through a dependency proceeding in which the state could demonstrate that the children were wards of the state because they had no surviving parent or guardian, ILL. REV. STAT. ch. 37, §§ 702-1, -5(1)(a) (1973), or (2) through a neglect proceeding, if the state could demonstrate that children should be wards of the state because the present parent(s) or guardian does not provide suitable care, ILL. REV. STAT. ch. 37, §§ 702-1, -4 (1973). ILL. REV. STAT. ch. 37, § 701-14 (1973) defined "Parents" as: "the father and mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child, and includes any adoptive parent." Since unwed fathers did not fit into the statutory definition of "parents," their children could become wards of the state pursuant to dependency proceedings. In neglect proceedings, the

father's unfitness before the state could assume custody.[22] The Georgia court noted that Stanley was a *de facto* member of the family unit and the mother was dead, whereas Quilloin had never actually lived with his child and the child's mother was alive.[23] The court therefore found *Stanley* not controlling and upheld the statute.

The dissent argued that the majority had misconstrued *Stanley*. In *Stanley*, the right to due process before losing custody of a child stemmed from the biological fact of paternity, rather than the legal or *de facto* relationship required by the majority.[24] The intent of *Stanley*, according to the dissenters, was to afford an opportunity for fitness hearings to *all* natural fathers, not only those who lived with their offspring.[25] They noted that *Stanley* even approved notice of custody hearings by publication to "All whom it may Concern" where the father was unknown or had disappeared.[26] Since, in the dissent's view, unwed fathers automatically possess due process rights by virtue of biological paternity, a statutory scheme which grants notice and a hearing

burden was on the state to show parental unfitness, whereas unfitness was presumed at law in dependency proceedings.

22. 405 U.S. at 658. The *Stanley* Court observed that administrative convenience did not justify denial of due process protection, since "[T]he Constitution recognizes higher values than speed and efficiency." *Id.* at 656.

23. Quilloin v. Walcott, 238 Ga. at 233-34, 232 S.E.2d at 248-49. In view of the Georgia majority's perception of the factual distinction between *Stanley* and *Quilloin*, Chief Justice Burger's description of the facts in *Stanley* is of some interest. In his dissenting opinion, he noted that Stanley had turned his two children over to a married couple after their mother's death and had made no attempt to gain legal recognition of parental or guardianship rights until the state instituted dependency proceedings. In addition, he asserted that Stanley asked only that legal custody of the children not be granted to anyone else, not that he be given legal responsibility. He observed that Stanley was concerned over the loss of welfare payments he would suffer as a result of the designation of a legal guardian of the children. 405 U.S. at 667 (Burger, C.J., joined by Blackmun, J., dissenting). Chief Justice Burger also noted a fact omitted in the majority opinion. Stanley's oldest child had "previously been declared a ward of the court pursuant to a neglect proceeding that was "proven against" Stanley at a time, apparently, when the juvenile court officials were under the erroneous impression that Peter and Joan Stanley had been married." *Id.* at 667 n.5 (Burger, C.J., joined by Blackmun, J., dissenting.

The Georgia court also noted that "Georgia recognizes common law marriages but Illinois does not." Quilloin v. Walcott, 238 Ga. at 233 n.2, 232 S.E.2d 248 n.2 (1977). This recognition apparently implies that a natural father could accede to parental rights by residing with the child's mother for the prescribed number of years to satisfy common law requirements. The court did not discuss what Quilloin's due process rights would have been if he had resided with his child and the mother for a period less than that of the common-law marriage threshold.

24. Quilloin v. Walcott, 238 Ga. at 234-35, 232 S.E.2d at 249 (Undercofler, P.J., joined by Gunter & Ingram, JJ., dissenting).

25. *Id.*

26. *Id.*

to all other parents except unwed fathers violates equal protection.[27] Implicit in the dissent was the substantive judgment that an unwed father should not be deprived of parental rights without a showing of unfitness.

The Supreme Court's interpretation of *Stanley* differed from that of the Georgia court's dissenters. Justice Marshall, writing for the Court, stated that *Stanley* balanced the "cognizable and substantial" interest of the natural father in the custody of his children against the state's *de minimus* interest in caring for children if the father is shown to be a fit parent.[28] In addition, the Court stated that *Stanley* did not resolve the question of what degree of protection a state must afford to the rights of unwed fathers where substantial countervailing interests exist.[29] *Stanley* was thus held to employ a balancing approach rather than the automatic entitlement to due process perceived by the Georgia court's dissenters.

Quilloin challenged the constitutionality of Georgia's statutory scheme as applied to his case, contending that absent a finding of his unfitness as a parent, he should be entitled to absolute veto power over his child's adoption.[30] He did not object to the sufficiency of notice he received of the pending adoption, nor was denial of procedural due process at issue since Quilloin was afforded a full hearing on his legitimation petition in the consolidated proceedings.[31] The appellees argued that Quilloin had *no* constitutionally protectable due process right because he had not petitioned to legitimate the child until the adoption proceedings had begun.[32] Noting Quilloin's alleged unawareness of the availability of legitimation proceedings,[33] the Court did not reach the issue of whether a natural father was entitled to procedural due process in such a case because it found that the standard employed by the Georgia courts did not offend any substantive rights Quilloin might have possessed.[34]

The Court stressed that the result of adoption in this case was to recognize an existing family unit, not to uproot a child from a familiar setting.[35] Under the circumstances, the Court reasoned that the state

27. *Id.* at 235-36, 232 S.E.2d at 249-50.
28. Quilloin v. Walcott, 434 U.S. at 248.
29. *Id.*
30. *Id.* at 253.
31. *Id.*
32. *Id.* at 254.
33. *Id.* at 254 & n.14.
34. *Id.* at 254.
35. *Id.* at 255.

was only required to find that the adoption and denial of legitimation were in the best interests of the child, not that Quilloin was actually an unfit parent.[36] The Court also rejected Quilloin's claim of denial of equal protection, sanctioning the state's power to treat unwed fathers differently from all other classifications of natural parents.[37] Justification for different treatment was found in the recognizable "difference in the extent of commitment to the welfare of the child"[38] shown by a willingness to assume legal custody.

The Court avoided any discussion of the precipitating cause of the adoption petition—Quilloin's visits with his child—but noted that although the child desired adoption, he also wished to continue to see his natural father.[39] Under Georgia law, however, adoption would divest the natural father of all parental rights including visitation rights.[40] Even if a court finds denial of legitimation and granting of adoption to be in the best interests of the child, an apparently reasonable inquiry is whether visiting rights are also in the child's best interest.[41] If the natural father is not found to be neglectful or unfit, the rationality of denying the child the opportunity to know and associate with him might well be questioned.[42] However, Quilloin did not attack the statute di-

36. *Id.*

37. *Id.* at 255-56.

38. *Id.* at 256. The Court noted that Quilloin's interests were readily distinguishable from those of divorced fathers, since the latter would have borne full legal responsibility for their children during the term of the marriage. *Id.*

39. *Id.* at 251 & n.11.

40. GA. CODE ANN. § 74-414 (1973).

41. The Court noted that the trial court had determined that adoption would be in the best interest of the child and further, that granting legitimation or visitation rights would not be in the child's best interest. The trial court did not, however, find that Quilloin was unfit or that he had abandoned his child. 434 U.S. at 251.

42. In another decision, Smith v. Organization of Foster Families, 431 U.S. 816 (1977), the Court reversed a district court ruling that foster *children's* due process rights were violated through their improvident removal from foster homes. The "grievous loss" allegedly suffered by the children did not impinge on a sufficient liberty interest such as to justify derogation of the natural parents' substantive liberty interest in regaining custody. *Id.* at 840-46. The concurring opinion went further in rejecting *any* assumption that foster children might have "some sort of 'liberty' interest in the continuation of [the] relationship." *Id.* at 857-58 (Stewart, J., joined by Burger, C.J. & Rehnquist, J., concurring). One of *Smith's* primary rationales for rejecting the foster children's and families' claim to constitutionally protected familial privacy was the fact that the foster relationship has its source in state law, rather than in history and tradition. The challenged New York procedures for returning children to their natural parents were apparently designed to counteract agency discrimination against low-status natural parents who had agreed to temporary placement. For a discussion of foster care as an example of wealth-based and racial discrimination *see, e.g.*, A. KADUSHIN, CHILD WELFARE SERVICES 355 (1967); Jenkins, *Child Welfare as a Class System*, in CHILDREN AND DECENT PEOPLE 3, 11-12 (A. Schorr ed. 1974); Mnookin, *Foster Care—In Whose Best Interests?*, 43 HARV. EDUC. REV. 599, 600 (1973).

vesting parents of visitation rights upon adoption of the child and the Court, therefore, did not consider the question.

In effect, *Quilloin* affirms statutes of many states and the common law rule that unwed mothers are vested with sole parental authority over their children unless the natural father takes positive legal steps to gain a paternal voice.[43] However, the Court's language suggests that given a different fact situation—one in which the natural father had attempted to gain custody of his child and had contributed substantially to the child's welfare—a "best interests of the child" standard would have to consider the natural father's fitness in determining parental rights.[44]

A realistic appraisal of the Georgia statutory scheme indicates that unwed mothers would have little to gain by consenting to their child's legitimation by the natural father, other than the child's eligibility for inheritance from the father. On the other hand, once the child is legitimated, the father gains veto authority over the child's adoption and coequal parental powers.[45] Since Georgia law requires fathers to support their children regardless of legitimacy,[46] the only additional obligation imposed on the father by legitimation is that upon his estate. The only incentive for the mother to accede to legitimation, then, is the possibility of the child inheriting from its father's estate, a remote possibility in many cases because of the natural father's indigence. If the mother contests legitimation, a court is likely to deny it if she is married and the child is living with her,[47] as in *Quilloin*, by applying a "best

43. *See, e.g.*, Orsini v. Blasi, 36 N.Y.2d 568, 331 N.E.2d 486, 379 N.Y.S.2d 511 (1975), *appeal dismissed*, 423 U.S. 1042 (1976) (unwed father who lived with the child and its mother for two years denied veto authority over child's adoption); Doe v. Roe, 37 App. Div. 2d 433, 326 N.Y.S.2d 421 (1971) (putative father who had executed a written agreement with mother which purported to extend some parental rights to father, had lived with child and mother for six months and had fulfilled child support obligations was denied veto power over child's adoption); *In re* Connolly, 43 Ohio App. 2d 38, 332 N.E.2d 376 (1974) (mother of illegitimate child is its natural guardian and has the legal right to custody, care and control, superior to the right of the natural father); Hanson v. Jones, 6 Wash. App. 701, 495 P.2d 1059 (1972) (putative father denied appointment as children's guardian because appointment would constitute derogation of mother's custodial control, even though serious questions of maternal fitness were raised).

44. 434 U.S. at 255. The Court negatively distinguished hypothetical cases in which a father might seek actual or legal custody, or had assumed significant responsibility for the child.

45. *See* note 5 and accompanying text *supra*.

46. GA. CODE ANN. § 74-202 (3027) (1973).

47. *See, e.g.*, Orsini v. Blasi, 36 N.Y.2d 568, 331 N.E.2d 486, 379 N.Y.S.2d 511 (1975), *appeal dismissed*, 423 U.S. 1042 (1976); Doe v. Roe, 37 App. Div. 2d 433, 326 N.Y.S.2d 421 (1971); Note, *Family Law—Voluntary Legitimation—Father Has No Absolute Right to Legitimate Child Solely On Proof of Biological Fatherhood*, 8 ST. MARY'S L.J. 392 (1976). *See also*

interests of the child" standard. While it is undoubtedly preferable to give the child's best interest primary consideration,[48] when this is done in a mechanical fashion one might query whether the means employed rationally relate to the end sought. Presumptions of maternal fitness and superiority of a family environment may not always reflect reality; however, these presumptions were held in *Quilloin* to be so weighty as to deprive the unwed father of any parental rights.

An increasing number of fathers are winning the custody of their children in divorce cases, and outright presumptions of maternal fitness and paternal unfitness for single parenthood appear to be declining.[49] Actual and *de facto* presumptions favoring mothers still operate, however, to deny custody to many fathers unless gross maternal unfitness can be shown.[50] In addition to this lingering prejudice, the unwed father must also overcome inherent presumptions of irresponsibility and lack of parental concern. Although *Quilloin* was not the ideal case in which to test the fairness and reasonableness of statutory schemes favoring unwed mothers over fathers, the Court could have examined Quilloin's due process and equal protection claims more thoroughly than it did.

Stanley, decided during the reign of the "irrebuttable presumption" doctrine,[51] held that a presumption of an unwed father's unfitness

Cheryl Lynn H. v. Superior Court, 41 Cal. App. 3d 273, 115 Cal. Rptr. 849 (1974) (mother may preclude legitimation by refusing to marry child's natural father or relinquish custody of the child to him).

48. The policy of most states is to recognize a right of custody in the natural mother superior, absent forfeiture, to all others, including the father, but also to recognize a paramount interest in the welfare of the child. *See, e.g., In re* R.L.G., 274 So.2d 4 (Fla. App. 1973); Cornell v. Hartley, 54 Misc. 2d 732, 283 N.Y.S.2d 318 (N.Y. Fam. Ct. 1967); Sparks v. Phelps, 22 Or. App. 570, 540 P.2d 397 (1975).

49. *See, e.g., In re* Doe, 52 Haw. 448, 478 P.2d 844 (1970); People *ex rel.* Vallera v. Rivera, 39 Ill. App. 3d 775, 351 N.E.2d 391 (1976).

50. *See, e.g.*, Anonymous v. Anonymous, 26 N.Y.2d 740, 257 N.E.2d 288, 309 N.Y.S2d 40 (1970) (father denied custody although mother had posed for nude pictures, used pills and marijuana and left child with grandmother during the day); Z. v. A., 36 App. Div. 2d 995, 320 N.Y.S.2d 997 (1971) (mother ruled prima facie entitled to custody despite father's ability to provide family environment and economic advantages); Commissioner *ex rel.* Gifford v. Miller, 213 Pa. Super. Ct. 269, 248 A.2d 63 (1968) (past indiscretions of mother and father's interest in and capability of ensuring child's well-being were not compelling reasons for taking child from mother).

51. This doctrine provided a means for invalidating statutes which, on the basis of a conclusive presumption, denied benefits to or imposed burdens on a particular class of persons. In a series of decisions beginning in 1943 with Tot v. United States, 319 U.S. 463 (1943), frequently relied upon during the early 1970's, the Court required individualized consideration of eligibility or fitness, despite the additional administrative burden which hearings would place on a state. The doctrine, grounded in the due process clause of the Fourteenth Amendment, avoided some of the more rigorous requirements which would be

was repugnant to the due process guarantee of the Fourteenth Amendment.[52] One of the evils which *Stanley* was directed toward curing was the burden placed upon an unwed father to establish "not only that he would be a suitable parent but also that he would be the most suitable of all who might want custody of the children."[53] Such a burden would place unmarried and indigent natural fathers at a distinct disadvantage.[54] The language of *Stanley* provided the basis for subsequent paternal custody claims, some of which have been successful.[55] Clearly *Quilloin* limits *Stanley* to cases in which the unwed father has played a significant role in his child's life. In cases where the mother has continuously resided with the child and can provide a stable family environment, even a substantial degree of paternal involvement on the part of the natural father may not be sufficient to preserve his parental rights.

B. Marriage—Fundamental Right or Substantive Liberty?

The Supreme Court issued six opinions in *Zablocki v. Redhail*,[56] a case challenging the constitutionality of a Wisconsin statute which prevented non-custodial parents, who were under a legal obligation to support minor issue, from marrying without first obtaining a court order granting permission to marry.[57] The statute required marriage applicants to submit to the court proof of compliance with the support obligation, and also to demonstrate that children covered by the support order were "not then and are not likely thereafter to become pub-

imposed under equal protection analysis. It did not require a showing of a suspect class or fundamental interest to trigger what amounted to "strict scrutiny." It also avoided explicit use of the disfavored term "substantive due process." *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726 (1963); Nebbia v. New York, 291 U.S. 502 (1933); Buck v. Bell, 274 U.S. 200 (1927) for decisions in which the Court declined to sit as a "superlegislature" over state legislatures. The irrebuttable presumption doctrine has been compared to the substantive due process doctrine of the *Lochner* era. Lochner v. New York, 198 U.S. 45 (1905) invalidated a New York statute which forbade employment in a bakery for more than 60 hours a week or 10 hours a day. It has encountered the same attacks which eventually demolished the *Lochner* holding and its progeny. Justice Rehnquist has been the Court's most outspoken critic of the doctrine. *See, e.g.*, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 657-60 (1974) (Rehnquist, J., joined by Burger, C.J., dissenting); Vlandis v. Kline, 412 U.S. 441, 466 (1973) (Rehnquist, J., joined by Burger, C.J. & Douglas, J., dissenting).

52. 405 U.S. 645, 657 & n.9 (1972).

53. *Id.* at 648.

54. *Id.* at 648 & n.3.

55. *See, e.g.*, Vanderlaan v. Vanderlaan, 9 Ill. App. 3d 260, 292 N.E.2d 145 (1972); Lewis v. Lutheran Social Servs., 59 Wis. 2d 1, 207 N.W.2d 826 (1973).

56. 434 U.S. 374 (1978). Justice Marshall wrote the Court's opinion; Chief Justice Burger issued a short concurring opinion; Justices Stewart, Powell and Stevens issued opinions concurring in the judgment, and Justice Rehnquist wrote a dissent.

57. WIS. STAT. § 245.10 (1), (4), (5) (1973).

lic charges."[58] Marriages entered into without compliance with the statute, whether performed in Wisconsin or other states, were declared void.[59] Justice Marshall, writing for the Court, found the statute violative of equal protection, reasoning that it established a class of persons whose fundamental right to marry was unconstitutionally burdened.[60] He observed that the legitimate state interests of protecting the welfare of children and counseling marriage applicants as to the necessity of fulfilling prior support obligations did not justify the "broad infringement on the right to marry" imposed by the "collection-device" statutory requirement.[61]

The Court's reliance on equal protection principles drew criticism from Justices Stewart and Powell, who wrote separate opinions concurring in the judgment. Justice Stewart disagreed with the characterization of marriage as a "fundamental right," as well as with the majority's perception of a discriminatory classification of marriage applicants.[62] In his view, the proper analysis should be based on the due process clause.[63] The freedom to marry, a protected liberty subject to reasonable state regulation, should not be abridged without demonstration of the legitimacy of the state's interest and the rationality and narrowness of the means used to effectuate the state's interest.[64] Justice Stewart contended that the Court had cloaked a substantive due process judgment in the guise of equal protection doctrine.[65] In his view, the Court's decision limited the state's power to regulate marriage, rather than forcing the state to draw statutory classifications more precisely to avoid invidious discrimination.[66] Such exercise of judicial power, he reasoned, should be acknowledged for what it is and used carefully.[67]

Justice Stewart concluded that the challenged statute offended due process because it imposed an absolute deprivation of the benefits of

58. *Id.* § 245.10(1).

59. *Id.* § 245.10(5). In addition to declaring void a marriage contracted without compliance with the statute, WIS. STAT. § 245.30 (1)(f) (1973) prescribed criminal penalties for noncompliance.

60. 434 U.S. at 387. *See* EQUAL PROTECTION notes 74-168 and accompanying text *infra* for discussion of the majority opinion.

61. 434 U.S. at 388-89.

62. *Id.* at 391-92 (Stewart, J., concurring in the judgment).

63. *Id.* at 392.

64. *Id.* at 395-96 (citing Williams v. Illinois, 399 U.S. 235, 260 (1970) (Harlan, J., concurring)).

65. *Id.* at 395-96.

66. *Id.* at 392-94.

67. *Id.* at 395-96.

marriage upon those who were too indigent to comply with its requirements.[68] In his view, as applied to indigents the law was an irrational means of achieving the state's purpose of inducing compliance with support obligations.[69] He found that the law more plausibly related to the purpose of insuring the financial viability of future marriages, but that even as to this objective the state had overstepped its boundaries.[70] "The invasion of constitutionally protected liberty and the chance of erroneous prediction are simply too great," he asserted, and thus offend notions of fairness and due process.[71] Justice Stewart appears to have modified his view of the limits of the due process clause. In *Griswold v. Connecticut*,[72] his dissenting opinion decried the use of the clause to invalidate state laws which infringed on rights not explicitly found in the Constitution.[73] In *Roe v. Wade*,[74] however, he adopted the position which he later repeated in *Redhail*, stating: "[T]he Griswold decision can be rationally understood only as a holding that the Connecticut statute substantively invaded the liberty that is protected by the Due Process Clause of the Fourteenth Amendment."[75]

Justice Stewart's position on the substantive due process nature of the *Redhail* decision appears valid. The cases cited by the majority in support of its holding that marriage is a fundamental right regarded the right to marry as a "central part of the liberty protected by the Due Process Clause"[76] or as a component of the "right to privacy" implicit

68. *Id.* at 394-95.
69. *Id.* at 394.
70. *Id.* at 394-95.
71. *Id.* at 395.
72. 381 U.S. 479 (1965).
73. *Id.* at 528-31 (Stewart, J., joined by Black, J., dissenting).
74. 410 U.S. 113 (1973).
75. *Id.* at 168 (Stewart, J., concurring).
76. 434 U.S. at 384 (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923)). The Court cited Loving v. Virginia, 388 U.S. 1 (1967) as the leading authority on the right to marry. *Loving* was decided primarily on equal protection grounds because the antimiscegenation statutes challenged there discriminated on the basis of race. The primary focus, however, was on the invidious racial discrimination, not on the impingement of a fundamental right to marry. The *Loving* decision also noted that the challenged statute offended due process because race was not a supportable basis for denial of the freedom to marry. *Id.* at 12. Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942), also cited by the Court, was similarly decided on equal protection grounds. *Skinner* regarded as an invidious classification the sterilization of twice-convicted felons whose crimes involved moral turpitude. This discriminatory classification was held to violate equal protection because it infringed on the fundamental civil rights of marriage and procreation. *Id.* at 541. While *Skinner* provides some basis for strict scrutiny of classifications impinging on marriage, its equal protection rationale was criticized in a concurring opinion by Chief Justice Stone, who viewed the blanket condemnation of certain offenders to sterilization as a violation of due process. *Id.* at 545. *See also* Comments of C. Foote, Arthur Garfield Hayes Conference, New York City

in due process.[77] While it is within the province of the Court to recognize important traditional values of our society in making its decisions, the sudden shift from due process to equal protection analysis requires more clarification than the majority opinion provided.[78] Focusing on

(1963), *reprinted in The Proper Role of the United States Supreme Court in Civil Liberties Cases* (N. Dorsen ed.), 10 WAYNE L. REV. 457, 471-72 (1964), for criticism of the narrowness of the *Skinner* Court's equal protection ruling.

77. 434 U.S. at 384-85. The Court cited Griswold v. Connecticut, 381 U.S. 479 (1965) (penumbral right of privacy protects the decisions of married couples to utilize contraceptive devices) and Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (school board rule requiring pregnant teachers to take leave without pay for at least five months burdened the exercise of personal choice in matters of marriage and family life through conclusive presumption of incapacity). *See* note 51 *supra* for a discussion of the "irrebuttable presumption doctrine." The other case primarily relied upon was Carey v. Population Servs. Int'l, 431 U.S. 678 (1977). *Carey* invalidated New York statutes which prohibited advertisement for contraceptives, the sale of contraceptives to minors and the sale of contraceptives by anyone except a licensed pharmacist. Although *Carey* noted that the due process right of privacy was involved, it primarily addressed the issues of whether a compelling state interest existed and whether the means used to effect that interest were sufficiently narrow. *Id.* at 684-86. The decision never explicitly relied on due process or equal protection, and the method of analysis employed by the Court suggests a synthesis of the two clauses.

78. A consideration of the specific level of scrutiny to be accorded to the reasonableness of challenged statutes which relate to marriage is particularly neglected in the opinion. The *Redhail* Court stated: "By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed." 434 U.S. at 386. Justice Marshall distinguished the Court's unanimous holding in Califano v. Jobst, 434 U.S. 47 (1977), which upheld provisions of the Social Security Act terminating benefits of a dependent disabled child who married an individual not entitled to benefits, regardless of the latter individual's handicapped or indigent status. Exempted from the termination rule, however, were marriages between persons who were both beneficiaries under the Act. The Court reached its conclusion by applying a rational basis standard of review, finding that the general rule terminating benefits upon marriage and the exception continuing benefits for handicapped individuals who married persons also entitled to benefits were reasonable. *See* EQUAL PROTECTION notes 58-61 and accompanying text *infra*. The distinction Justice Marshall drew was based on the lack of direct and substantial interference with the decision to marry in *Jobst*, which he found present in *Redhail*. *See* Zablocki v. Redhail, 434 U.S. at 386-87. Noting that the Jobsts' income was reduced by only $20 per month after termination of benefits, he failed to find any significant discouragement of marriage. *Id.* at 387. This position is somewhat at odds with Justice Marshall's dissent in Maher v. Roe, 432 U.S. 464 (1977), and Beal v. Doe, 432 U.S. 438 (1977), which criticized the Court's "intellectually disingenuous 'two-tier' equal protection analysis." *Id.* at 457. By applying a rationality standard, the *Maher* Court found that a Connecticut regulation which refused Medicaid benefits for nontherapeutic abortions, but granted Medicaid benefits for childbirth, did not violate equal protection. *Maher* purported to find a "basic difference between direct state interference with a protected activity and state encouragement of an alternative activity." 432 U.S. at 475. Justice Stevens felt compelled to expand on the "tension" between *Jobst* and the *Redhail* majority opinion. He saw a distinction between "marital status" and a classification which determines who may lawfully enter into marriage. Zablocki v. Redhail,

this omission, Justice Powell noted the problems which inhere in distinguishing whether or not a state regulation directly and substantially interferes with the decision to marry.[79] He pointed out that state regulation of marriage "typically takes the form of a prerequisite or barrier."[80] Thus, legislatures and courts are left with little guidance as to what limits are reasonable. Reliance on substantive due process in cases like *Redhail* would not resolve the confusion as to how much and what kind of state regulation of the freedom to marry is permissible. It would, however, presumably leave intact those instances of state restriction on marriage which are justified by reasonable, though perhaps not compelling, state interests. It appears pertinent to query whether the Court was merely acting out of distaste for the doctrine of substantive due process,[81] or whether it was providing a foundation for strict scrutiny analysis of future challenges to state restrictions on marriage.

Justice Powell's concurrence criticized the "compelling state interest" showing which would be required for direct state interference with a "fundamental right to marry."[82] He noted that domestic relations have traditionally been a "virtually exclusive province of the States."[83] State regulations banning incestuous, bigamous or homosexual marriages or setting preconditions such as blood tests might be called into question under a compelling state interest inquiry.[84] Relying on *Boddie v. Connecticut*,[85] Justice Powell found the statute violative of due process because it failed to make provision for those who were unable to comply with child support obligations.[86] He disagreed with the Court, however, on the impermissibility of a state "collection-device" as applied to individuals who "simply wish to shirk their moral and legal obligation."[87] A statute which conditioned the right to marry on satisfaction of support obligations would, in his view, be proper if it exempted those who were able to prove the *bona fides* of their

434 U.S. at 403-04 (Stevens, J., concurring). The latter classification, in his view, merits constitutional protection from discriminatory state regulation. *Jobst*, on the other hand, involved a valid regulation based on marital status. *Id.*

79. 434 U.S. at 396-97 (Powell, J., concurring).

80. *Id.* at 397.

81. *See* note 51 *supra.*

82. 434 U.S. at 396-97 (Powell, J., concurring).

83. *Id.* at 398 (quoting Sosna v. Iowa, 419 U.S. 393, 404 (1975)).

84. 434 U.S. at 399 (Powell, J., concurring).

85. 401 U.S. 371 (1971). *Boddie* upheld a challenge to a state's requirement of the payment of court fees and costs as a precondition to suit for divorce, as applied to indigents. State monopoly of the divorce process was held to require equal access for all citizens.

86. 434 U.S. at 400 (Powell, J., concurring).

87. *Id.*

indigency.[88]

Justice Powell also noted the arbitrariness of the statute's requirement that a marriage applicant demonstrate that his children "are not then and are not likely thereafter to become public charges."[89] The effect of this provision could be to preclude indigents from marriage whether or not they had met their support obligations. In addition, since there are no plausible standards for determining the likelihood of children becoming public charges, he viewed the statute as granting a judge a "license for arbitrary procedure."[90] These deficiencies, coupled with the statute's underinclusiveness, were grounds for Justice Powell's finding of due process and equal protection violations.

Justice Rehnquist, the lone dissenter, assumed a deferential stance toward state regulation. He joined with Justices Powell and Stewart in rejecting the concept of marriage as a fundamental right sufficient to trigger strict scrutiny, but disagreed with their belief that the statute was irrational as applied to those who are truly indigent.[91] Characterizing the state's aim of securing as much support for needy children as their parents are able to pay as "an exceptionally strong interest,"[92] he found the state provisions to be sufficiently rational to satisfy the Fourteenth Amendment despite its "possible imprecision" in extreme, atypical cases.[93] Citing the Court's analysis in *Califano v. Jobst*,[94] he found the burden imposed by Wisconsin on the right to marry to be so substantially similar as to justify a like result.[95] This analogy between *Jobst* and *Redhail* may be nearer to reality than the distinction perceived by the Court, which noted that *Jobst* concerned a reasonable regulation that did not "significantly interfere" with the decision to marry.[96] Justice Rehnquist did not, however, comment on the possible arbitrariness of foreclosing marriage to indigents, nor did he discuss the fairness of the statute's requirement that a marriage applicant demonstrate that his children would not become public charges in the future. Even if the "right to marry" does not rise to the level of a "fundamental right" in equal protection analysis, the extreme deference of Justice

88. *Id.*
89. *Id.* at 402.
90. *Id.* at 402 n.4 (quoting Kent v. United States, 383 U.S. 541, 553 (1966)).
91. 434 U.S. at 407 (Rehnquist, J., dissenting).
92. *Id.* at 408.
93. *Id.* at 407-08.
94. 434 U.S. 47 (1977).
95. Justice Rehnquist noted that financial and legal obstacles to marriage both have the result of making marriage "practically impossible." 434 U.S. at 408.
96. *Id.* at 386-87 & n.12. *See* note 78 *supra.*

Rehnquist's position is inapposite to the due process underpinnings of such decisions as *Loving v. Virginia*,[97] *Boddie v. Connecticut*,[98] *Carey v. Population Services International*[99] and *Cleveland Board of Education v. LaFleur*.[100] All of these cases noted that freedom of choice in matters of marriage and family life is one of the liberties protected by the due process clause of the Fourteenth Amendment. A protected liberty may not be infringed by the state in an arbitrary or discriminatory manner. By focusing solely on the rationality of the state's purpose in enacting the challenged statute, Justice Rehnquist dismissed the irrational and discriminatory effect it visited upon certain individuals.

II. Due Process in Schools

A. Righting a Constitutional Wrong

Denial of procedural due process, an infringement of an "absolute" right,[101] was held in *Carey v. Piphus*[102] to entitle an injured party only to nominal damages in the absence of proof of actual injury. Jarius Piphus, a high school freshman, had been suspended from school for twenty days for smoking what appeared to be a marijuana cigarette.[103] The suspension took effect immediately after the smoking incident, despite Piphus' assertion that the cigarette was not marijuana.[104] Several days later, two meetings were held between school officials, Piphus' mother and sister, and representatives of a legal aid clinic, not for the purpose of determining the truth of Piphus' claim, but rather to explain the reasons for the suspension.[105] Unsatisfied with the outcome of the discussions, Piphus filed suit in federal district court alleging violation of his right to procedural due process under the Fourteenth Amendment.

Piphus' case was consolidated with that of Silas Brisco, a sixth grade student, who had been suspended for twenty days for wearing an earring in violation of a school rule. Males were prohibited from wearing earrings because such adornment was thought to denote gang mem-

97. 388 U.S. 1 (1967).
98. 401 U.S. 371 (1971).
99. 431 U.S. 678 (1977).
100. 414 U.S. 632 (1974).
101. Carey v. Piphus, 435 U.S. 247, 266 (1978). The Court viewed the right to procedural due process as "absolute" in that it does not depend on the merits of an individual's claim. *Id.*
102. 435 U.S. 247 (1978).
103. *Id.* at 249.
104. *Id.*
105. *Id.*

bership.[106] Although he had been given several warnings, Brisco refused, with the approval of his mother, to remove the earring, which he asserted was a symbol of black pride, not gang membership.[107] The students sued under section 1983 of the Civil Rights Act[108] seeking declaratory and injunctive relief, plus actual and punitive damages in the amount of $8,000.

The district court held that both students were entitled to and had been denied procedural due process.[109] The students' claim for damages failed for lack of proof, however, and the court did not reach the question of whether or not the suspensions were justified.[110] The Seventh Circuit Court of Appeals reversed and remanded,[111] holding that: 1) declaratory and injunctive relief should have been granted;[112] 2) the trial court should have heard evidence as to the pecuniary value of

106. *Id.* at 250.

107. *Id.*

108. The Civil Rights Act of 1871, § 1, 42 U.S.C. § 1983 (1976) provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

109. Carey v. Piphus, 435 U.S. at 251. The students' suspensions occurred before the Supreme Court ruling in Goss v. Lopez, 419 U.S. 565 (1975), that any disciplinary proceeding involving a suspension that was not *de minimus* must afford the student an opportunity to challenge the grounds for such action. 419 U.S. at 582-83. The *Carey* district court, however, relied on Linwood v. Board of Educ., 463 F.2d 763 (7th Cir.), *cert. denied* 409 U.S. 1027 (1972) as placing defendant school officials on notice that the suspensions violated procedural due process. *Goss* did not mandate an evidentiary-type hearing in every case of student discipline. Rather, the court specified that students must be given oral or written notice of the charges; if the student denies the charges, he is entitled to a hearing prior to suspension. The Court defined a "hearing" as an opportunity for the student to hear an explanation of the evidence against him and to present his version, in an informal setting, taking place immediately after the "notice" has been given. 419 U.S. at 581-82. *Goss* also noted that expulsions or suspensions for more than 10 days might require more formal procedures. *Id.* at 584.

Wood v. Strickland, 420 U.S. 308 (1975) held that students suspended without proper process could maintain actions against school officials only if: (1) the officials acted with malicious intent to cause a deprivation of constitutional rights or other injury to the student, or (2) if they knew or reasonably should have known that their action would violate a student's constitutional rights. Absent such evidence of "bad faith," school officials would be immune from suit. *Id.* at 318. The district court in *Carey* found the school officials were not entitled to qualified immunity from suit, because their action, though not maliciously intended, was undertaken with knowledge of possible constitutional violation. Carey v. Piphus, 435 U.S. at 251.

110. 435 U.S. at 252.

111. Piphus v. Carey, 545 F.2d 30 (7th Cir. 1976), *rev'd*, 435 U.S. 247 (1978).

112. *Id.* at 31.

missed school days;[113] and 3) even if plaintiffs' suspensions were found to be justified, they would still be entitled to substantial "non-punitive" damages for their deprivation of procedural due process.[114]

In reversing the circuit court's ruling on the third point, the Supreme Court focused on the purpose of section one of the Civil Rights Act of 1871.[115] This provision established civil liability for the benefit of persons injured by a deprivation of their constitutional rights. The students argued that constitutional rights are valuable in and of themselves, and that violation of such rights may be *presumed* to cause injury. In addition, they contended that the deterrent effect of substantial damage liability justified sustaining the circuit court's decision.[116] The Court disagreed, stating that Congress' apparent intent in enacting section 1983 was to create a species of tort liability solely to compensate persons injured by a deprivation of their constitutional rights.[117] In applying the principle of compensation to the case before it, the Court noted that some constitutionally protectable interests may parallel interests protected under the common law of torts; in such cases, tort rules of damages could appropriately be applied.[118] In cases where the constitutionally protectable interests are not analogous to those protected by tort law, the court should adapt common-law principles of damages to fashion the proper remedy for the injury sustained.[119] In these situations, the nature of the interest protected by the constitutional right forms the basis for such an adaptation.[120]

113. *Id.* at 32. The court stated, however, that on remand defendant school officials would be entitled to offer evidence showing there was just cause for suspension. If the district court upheld the suspensions, the plaintiffs could not recover compensatory damages. *Id.*

114. *Id.* at 31-32. Punitive damages have been held recoverable in § 1983 actions when aggravating circumstances, such as malice, ill-will, reckless indifference to property or desire to injure, are present, even in the absence of actual loss to the plaintiff. *See, e.g.*, Silves v. Carmier, 529 F.2d 161, 163 (10th Cir. 1976); Spence v. Staras, 507 F.2d 554, 558 (7th Cir. 1974).

115. 42 U.S.C. § 1983 (1976). *See* note 108 *supra.*

116. Carey v. Piphus, 435 U.S. at 254.

117. The Court noted that the legislative history of § 1983 demonstrated an intention to create a "species of tort liability" in favor of persons who are deprived of "rights, privileges, or immunities secured" under the Constitution. 435 U.S. at 253 (citing Imbler v. Pachtman, 424 U.S. 409, 417 (1976)).

118. 435 U.S. at 257-58.

119. *Id.* at 258.

120. *Id.* at 259. The Court reiterated that "courts of law are capable of making the types of judgments concerning causation and magnitude of injury necessary to accord meaningful compensation for invasion of [constitutional] rights." *Id.* (citing Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 409 (1971) (Harlan, J., concurring)).

Turning to the problem of compensation, the Court stated that procedural due process is designed to guard against the unfair or mistaken deprivation of a liberty or property interest.[121] Where an individual has been denied procedural due process but the deprivation of liberty or property is found to be justified, however, the Court reasoned that the injury cannot necessarily be attributed to the constitutional violation.[122] Even where the deprivation is unjust, an injury cannot be presumed, it must be proven. Although acknowledging that one purpose of the due process clause is to convey the "feeling of just treatment" by the government,[123] distress suffered by an individual denied that feeling was found to be neither so inevitable nor so difficult to prove as to justify compensation without actual proof of such injury.[124] The Court concluded its opinion by reaffirming the importance of procedural due process and authorizing nominal damages, not to exceed one dollar, for the violation, regardless of proof of actual injury.[125]

121. 435 U.S. at 259. The *Goss v. Lopez* opinion delineated the liberty and property interests which students possess. The Court found that suspensions could damage pupils' standing with fellow students and teachers, as well as interfere with later employment and education opportunities. This type of injury to reputation implicates a person's liberty interest. Goss v. Lopez, 419 U.S. at 574-75. *See also* Board of Regents v. Roth, 408 U.S. 564, 573 (1972). A property interest is created by an independent source, such as state law, contract or tenure. 408 U.S. at 577-78. If a state has chosen to extend the right of education to a class of persons, it has thereby created a legitimate claim of entitlement, or property interest, in those persons. Goss v. Lopez, 419 U.S. at 572-74. Since the State of Ohio, the forum of *Goss*, specifically directed local authorities to provide free education to all residents of a certain age and compelled those persons to attend school, it was held to have established a property interest in education. *Id. See* OHIO REV. CODE ANN. §§ 3313.48, .64 (Page 1972 & Supp. 1973).

122. Carey v. Piphus, 435 U.S. at 263. The Court pointed out that, in many cases, a person may not even be aware of procedural deficiencies "until he enlists the aid of counsel to challenge a perceived substantive deprivation." *Id.* Also, an individual's distress in such situations may be more likely attributable to the actual deprivation than to the denial of procedural due process. *Id.*

123. *Id.* at 261 (citing Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring)).

124. Carey v. Piphus, 435 U.S. at 262-64. The Court rejected the students' argument that injury should be presumed, as it is in cases of defamation *per se*. Noting that the doctrine of presumed damages in defamation *per se* was "an oddity of tort law" (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974)), resulting from virtual certainty of damages which are nevertheless difficult to prove, the Court found the analogy inappropriate. 435 U.S. at 262-63.

125. *Id.* at 266-67. Although the Court did not directly address the effect of awarding only nominal damages on the possibility of discouraging suits for denial of procedural due process, it looked to the common-law practice of vindicating absolute rights by such awards. *Id.* at 266. It might be argued that the interests involved do not support the analogy drawn by the Court. The purpose of procedural due process is to protect the individual from unfair or mistaken deprivation of important interests by the state or its agents. *See* note 121 and accompanying text *supra*. A state agency which impairs an individual's liberty or property

The limitation of damages in *Carey* indicates no real departure from previous holdings and dicta.[126] As the opinion pointed out, section 1983 has been held to afford a remedy only for compensable injuries caused by violation of constitutional rights under color of law.[127] In many cases, the injury consists solely of embarrassment, humiliation or mental and emotional distress. In *Adickes v. S.H. Kress & Co.*,[128] for example, a plaintiff who was wrongfully ejected from a restaurant was held to have been denied equal protection due to racial discrimination. The Court noted that Adickes would be entitled to "recover compensation for actual damages, if any"[129] even in the absence of wilful conduct by the defendants. In order for punitive damages to be imposed, the defendant's actual knowledge of his violation of plaintiff's protected rights, or at least reckless disregard of such rights, must be shown.[130] The *Carey* opinion noted that the district court specifically found that the school officials did not act with a malicious intent to deprive stu-

interest without due process might well visit unfair deprivations on other similarly situated persons. *See, e.g.*, Arnett v. Kennedy, 416 U.S. 134, 218-19 (1974) (Marshall, J., joined by Douglas & Brennan, JJ., dissenting) (almost one fourth of all appeals from government agency employment discriminations result in a finding that the dismissal was illegal). The interests protected by the Fourteenth Amendment's due process clause have been termed "essential to the orderly pursuit of happiness by free men." Meyer v. Nebraska, 262 U.S. 390, 399 (1923). Justice Marshall, dissenting in *Roth*, noted that "it is procedural due process that is our fundamental guarantee of fairness, our protection against arbitrary, capricious, and unreasonable government action." Board of Regents v. Roth, 408 U.S. 564, 589 (1972) (Marshall, J., dissenting). The *Carey* Court's analogy of vindication of procedural rights with vindication of other more trivial, but absolute, rights dilutes the importance of procedural due process and the philosophical commitment to protecting individuals from the arbitrary exercise of government power.

The *Carey* Court reasoned, however, that the potential liability for compensatory damages, where infringement of a right was found to be unjustified and where injury could be shown, was a sufficient deterrent to deliberate violations of procedural due process. 435 U.S. at 256-57. In addition, an amendment to 42 U.S.C. § 1988 providing that defendants be liable for attorneys' fees in § 1983 actions, might insure compliance with constitutional requirements. *Id.* at 257 n.11 (citing Civil Rights Attorneys' Fees Awards Act of 1976, Pub. L. No. 94-559 § 2, 90 Stat. 2641 (amending 42 U.S.C. § 1988 (1970)).

126. *See, e.g.*, Ingraham v. Wright, 430 U.S. 651 (1977) (upholding the practice of reasonable corporal punishment in Florida schools without advance procedural safeguards); Mount Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 285-87 (1977) (teacher unconstitutionally dismissed for exercise of protected speech would not be entitled to reinstatement if school board could show by a preponderence of evidence that he would have been dismissed for other reasons); Imbler v. Pachtman, 424 U.S. 409 (1976) (prosecuting attorney absolutely immune from § 1983 suit arising out of his deliberate suppression of material evidence and knowing use of false testimony at a murder trial).

127. *See, e.g.*, Wood v. Strickland, 420 U.S. 308, 319 (1975); Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 396-97 (1971).

128. 398 U.S. 144 (1970).

129. *Id.* at 232.

130. *Id.* at 233. *See* note 114 *supra.*

dents of their rights or to do them other injury[131] and that the court of appeals approved only "non–punitive" damages.[132] The circuit court characterized its award of substantial damages for denial of due process absent harm as "non–punitive,"[133] but the difference between punitive damages and those prescribed by the circuit court appears to be merely semantic.

In *Codd v. Velger*,[134] a case analogous to *Carey*, a dismissed police trainee sought reinstatement and damages, claiming that his liberty interest had been infringed without due process because he had been stigmatized by a report in his employment file concerning an attempted suicide.[135] The file had been shown to his present employer who allegedly dismissed him because of its contents.[136] The Court denied any relief because Velger had not alleged the falsity of the report; if the report was not untrue, then Velger could not claim harm from the denial of procedural due process.[137] Justice Brennan, dissenting in *Velger*, stated that once a plaintiff establishes a violation of his constitutional rights, the burden shifts to the wrongdoer to demonstrate that the violation did not cause any harm.[138] In contrast, the *Carey* opinion indicated that on remand, the school officials would have to prove that the students would have been suspended even if a proper hearing had been held.[139] Even if they failed to prove this, however, the students would still have to show that they suffered injury in order to receive compensatory damages.[140] Furthermore, Justice Brennan noted in *Velger*: "A jury should be permitted to decide whether to fix and award damages—perhaps only nominal—for the very denial of a timely due process forum."[141] This language is somewhat inconsistent with Justice Brennan's agreement with the *Carey* majority, which specifically limited damages to one dollar or less.[142]

131. 435 U.S. at 251 n.6.

132. *Id.* at 252.

133. Piphus v. Carey, 545 F.2d at 32. The circuit court indicated that the amount awarded "should be neither so small as to trivialize the right nor so large as to provide a windfall." *Id.*

134. 429 U.S. 624 (1977) (*per curiam*).

135. *Id.* at 625.

136. *Id.* at 625-26.

137. *Id.* at 628.

138. *Id.* at 630-31 (Brennan, J., joined by Marshall, J., dissenting).

139. 435 U.S. at 260.

140. *Id.* at 264.

141. Codd v. Velger, 429 U.S. at 630 n.3 (Brennan, J., joined by Marshall, J., dissenting).

142. The *Carey* decision was unanimous, with the exception of Justice Blackmun, who took no part in the consideration or decision of the case. Justice Marshall concurred in the result without opinion. 435 U.S. at 267.

The *Carey* Court acknowledged that a few lower courts had permitted actions for damages in cases of employee dismissal with just cause, but without procedural due process.[143] In these cases, the fact of injury was clear in that the employee was deprived of salary and benefits between the time of the procedurally defective dismissal and the ultimate hearing. One lower court judge noted the "chilling implications for constitutional protections" if employees discharged without proper hearings could not obtain redress.[144] "[T]he lesson taught the state employer is that the constitutional safeguard of procedural due process may be safely ignored if adequate grounds for dismissal can be proved in the uncertain event of some future proceeding."[145] Where the issue is employment dismissal, the human component and conflicting interests in the employer-employee relationship may be more susceptible to bad faith denial of procedural due process than would be the case in student suspensions. It is not clear from the *Carey* opinion, however, whether the Court would affirm substantial damage awards in cases of procedurally defective employment dismissal.[146]

The Court did not specify whether violations of other constitutional rights would entitle the wronged party to more than nominal damages absent actual injury. The opinion did caution that "the elements and prerequisites for recovery of damages appropriate to com-

143. *Id.* at 260 n.15. The circuit court in *Carey* relied primarily on Hostrop v. Board of Jr. College, 523 F.2d 569 (7th Cir. 1975), *cert. denied*, 425 U.S. 963 (1976) in awarding damages solely for denial of due process. *Hostrop* stated that "[t]he wrong done plaintiff was not the termination of his employment, for that has been determined to have been justified, . . . but the deprivation of his procedural due process right to notice and a hearing." *Id.* at 579. The measure of damages, according to *Hostrop*, could be determined by considering "the nature of the constitutional deprivation and the magnitude of the mental distress and humiliation suffered by the plaintiff, as well as any other injury caused as a result of being deprived of federally protected rights." *Id.* at 580. *See also* Thomas v. Ward, 529 F.2d 916, 920 (4th Cir. 1975) (teacher held entitled to back pay from date of improper termination without due process to time of full hearing before board); Burt v. Board of Trustees, 521 F.2d 1201, 1208 (4th Cir. 1975) (failure of board to afford procedural due process held enough to support award of back pay including pension right compensation); Zimmerer v. Spencer, 485 F.2d 176, 179 (5th Cir. 1973) (even though board had valid, constitutionally sufficient reasons for teacher's discharge, delay in affording due process supported award of back pay with salary raise for a year plus attorneys' fees); Horton v. Orange County Bd. of Educ., 464 F.2d 536, 538 (4th Cir. 1972) (although plaintiff's conduct warranted discharge, procedural deficiencies sustained award of net pecuniary loss of wages for period between date of termination and date of the court's decisions).

144. Burt v. Board of Trustees, 521 F.2d 1201, 1207 (4th Cir. 1975) (Winter, J., concurring and dissenting).

145. *Id.*

146. The Court did not explicitly disapprove of the cases discussed in note 143 *supra*, although it remarked that the views expressed therein were contrary to both circuit court and Supreme Court holdings in *Carey*. 435 U.S. at 260 & n.15

pensate injuries caused by the deprivation of one constitutional right are not necessarily appropriate to compensate injuries caused by the deprivation of another."[147] Numerous cases have permitted damage actions for wrongful deprivation of the right to vote.[148] However, this is virtually the only constitutional violation which is held to merit substantial damages without demonstrable injury,[149] and the weighty policy considerations involved in protecting the right to vote may serve to lower the prerequisite threshold for recovery.

B. Dismissal for Deficient Academic Performance

The Supreme Court ruled in *Board of Curators of the University of Missouri v. Horowitz*[150] that the flexible nature of due process requires far less stringent procedures in cases of academic dismissal than for disciplinary suspension or expulsion.[151] Charlotte Horowitz had been admitted as an advanced student at the University of Missouri–Kansas City School of Medicine;[152] she entered medical school with the express intention of becoming a psychiatrist in order to teach or do research.[153] Part of the University's required curriculum included clinical studies,[154] and although Horowitz's academic performance was beyond reproach,[155] her clinical abilities were rated deficient by the faculty.[156]

147. *Id.* at 264-65.

148. *See, e.g.*, Nixon v. Herndon, 273 U.S. 536, 540 (1927); Wayne v. Venable, 260 F. 64 (8th Cir. 1919); Ashby v. White, 1 Eng. Rep. 417 (H.L.), *reviewed*, 92 Eng. Rep. 126 (K.B. 1703) (establishing a common-law rule of damages for wrongful deprivation of the right to vote).

149. The *Carey* Court distinguished cases relied upon by the circuit court in support of its ruling from those involving voting rights by noting that the former either ignored the question of injury or found some harm resulting from a constitutional violation. 435 U.S. at 264-65. *See, e.g.*, Jeanty v. McKey & Poague, Inc., 496 F.2d 1119 (7th Cir. 1974); Seaton v. Sky Realty Co., 491 F.2d 634 (7th Cir. 1974) (damages awarded in both cases for humiliation and distress inferred from discriminatory abridgment of equal housing opportunity). *See also* Basista v. Weir, 340 F.2d 74 (3rd Cir. 1965); Sexton v. Gibbs, 327 F. Supp. 134 (N.D. Tex. 1970), *aff'd*, 446 F.2d 904 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972); Rhoads v. Horvat, 270 F. Supp. 307 (D. Colo. 1967) (in these cases damages were awarded to compensate for humiliation and distress caused by illegal search, seizure or arrest).

150. 435 U.S. 78 (1978).

151. *Id.* at 86. *See* note 109 *supra*.

152. Horowitz v. Board of Curators, 538 F.2d 1317, 1318, *rehearing denied*, 542 F.2d 1335 (8th Cir. 1976), *rev'd*, 435 U.S. 78 (1978). Horowitz had a master's degree in psychology from Columbia University, had studied pharmacology at Duke University, had done graduate study and work in psychopharmacology at the National Institute of Health and scored in the 99th percentile in four categories on the Graduate Record Examination and in two categories on the Medical College Admissions Test. 538 F.2d at 1318.

153. 538 F.2d at 1318.

154. The University's curriculum was geared to training practicing physicians. *Id.*

155. Horowitz scored first in her class on Part I of the National Board Examination for

Despite a recommendation from the Council on Evaluation[157] that she not be advanced, Horowitz was admitted to the final year of study, but was placed on probation. She was informed at that time of her deficiencies and warned of the incompatibility of certain conduct with graduation.[158]

About six months later, in December of her final year, the Council reconsidered Horowitz's status and recommended that she not be permitted to graduate in June. The Council's recommendation was approved by a higher committee and, ultimately, by the Dean. Horowitz was told that she would be continued on probation, but that she could not graduate on schedule. She was given the option of taking a set of oral and practical examinations as an "appeal" of this decision.[159] The examinations were administered in various areas of clinical medicine by seven faculty physicians who thereafter gave their recommendations concerning Horowitz's future.[160] Two of the physicians recommended that she graduate on schedule; two others suggested that she continue on probation, and two recommended that she be dropped from the school. One faculty member believed she was not qualified to graduate at that time, but expressed no further opinion.[161]

These opinions were submitted to the Council on Evaluation, which reaffirmed its position that Horowitz should not graduate in June, and, shortly thereafter, recommended that she be dismissed from the school.[162] Although Horowitz had ample notice of her failure to meet University standards, she was never given an opportunity to rebut the evidence of academic deficiency at a hearing. When her attempts to obtain a reversal of this decision failed, she instituted a suit against the University under 42 U.S.C. § 1983,[163] alleging substantive and procedural due process violations. The district court dismissed her com-

medical students and second on Part II. She ranked fourth in her class examination in February, 1973 and second in May, 1973. *Id.*

156. One faculty member rated her performance as outstanding, but others criticized her lack of patient rapport, lack of expertise in coming to the fundamentals of the clinical problem, erratic attendance and poor personal hygiene. *Id.* at 1318-19.

157. The Council on Evaluation is a faculty-student body which can recommend various actions, including probation and dismissal. *Id.* at 1319.

158. *Id.*

159. *Id.*

160. *Id.* at 1320. The physicians were asked to make one of three recommendations: (1) graduate on schedule, (2) continued probation and reassessment of her status in May, 1973, and (3) dismissal from medical school. The option of recommending further study after May, 1973 was not included. *Id.*

161. *Id.*

162. *Id.*

163. 42 U.S.C. § 1983 (1976). *See* note 108 *supra.*

plaint after a full trial, concluding that she had received all of the rights guaranteed her by the Fourteenth Amendment.[164] This decision was reversed by the Court of Appeals for the Eighth Circuit, which found that Horowitz had been stigmatized by the dismissal, since it would probably foreclose any opportunity for her to attend another medical school or gain employment in a medical field.[165] Imposition of such a disability was held to constitute a deprivation of liberty without due process of law since Horowitz was not afforded a hearing.[166] Rehearing *en banc* was denied with three dissenting judges filing an opinion.[167]

Justice Rehnquist, writing for the majority, reversed the judgment of the circuit court. He found it unnecessary to decide whether Horowitz possessed any constitutionally protected due process interest, since, in any case, she received at least as much process as the Four-

164. Board of Curators v. Horowitz, 435 U.S. at 80.

165. Horowitz v. Board of Curators, 538 F.2d at 1321. The circuit court reasoned that the disability sustained by Horowitz met the criteria enunciated in Board of Regents v. Roth, 408 U.S. 564 (1972), that action by the state which imposed "a stigma or other disability that foreclosed . . . freedom to take advantage of other employment opportunities" was a deprivation of liberty requiring notice and a hearing. 538 F.2d at 1321, (quoting Board of Regents v. Roth, 408 U.S. at 573).

166. Horowitz v. Board of Curators, 538 F.2d at 1321. The Eighth Circuit relied primarily on Greenhill v. Bailey, 519 F.2d 5 (8th Cir. 1975) in determining that Horowitz had not been afforded procedural due process. Greenhill had been dismissed from the University of Iowa College of Medicine for poor academic standing, apparently because of his "lack of intellectual ability or insufficient preparation." *Id.* at 7. Although acknowledging the broad discretion of school officials in academic evaluations, the court noted that Greenhill's dismissal not only denigrated his academic performance, but also his intellectual ability. This stigma warranted notice in writing of the alleged intellectual deficiency and an opportunity to contest the allegation. *Id.* at 9.

167. Horowitz v. Board of Curators, 542 F.2d 1335 (8th Cir. 1976). The dissenting circuit judges contended that Horowitz's dismissal did not stigmatize her in the constitutional sense. They noted that the Supreme Court held in Bishop v. Wood, 426 U.S. 341 (1976) that in order for an individual to claim stigma or injury to reputation, he must show public disclosure of the reasons for employment dismissal. Since the actual communication of the reasons for Horowitz's dismissal took place in private, they believed her claim invalid under the *Bishop* test. Although this view appears to ignore the fact that Horowitz would undoubtedly be required to furnish information about her dismissal if she applied to any other school or for employment in a medical field, it reflects the recent trend of the Court's decisions, which, combined with others denying liberty infringement, may indicate a withdrawal from the *Roth* precepts. *See, e.g.*, Codd v. Velger, 429 U.S. 624 (1977), *discussed in* notes 134-41 and accompanying text *supra*; Paul v. Davis, 424 U.S. 693 (1976) (mere state-inflicted damage to reputation alone does not implicate a liberty interest; it must be coupled with a tangible interest, such as employment, to merit constitutional protection). For criticism of Court decisions limiting due process protection of property and liberty interests, see Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445 (1977).

teenth Amendment requires.[168] All of the justices concurred in this assessment of the adequacy of process afforded Horowitz.[169] Even Justice Marshall, who disagreed with much of the Court's analysis,[170] felt that Horowitz had been given all that *Goss v. Lopez*[171] mandated. He noted that she had received several notices and explanations and had been given at least three opportunities to present her side of the story informally.[172]

The majority opinion went further, however, endorsing a distinction formulated in state and lower federal courts between dismissal for deficient academic performance and suspension for disciplinary reasons.[173] This distinction is based on the similarity between disciplinary suspensions and traditional judicial and administrative factfinding, which is not thought to be present in the context of academic judgments of school officials.[174] Disciplinary suspensions rest on factual conclusions which may be erroneous, whereas academic judgments are based on the subjective evalutions of school officials.[175] The Court reasoned that the educational process is not by nature adversarial;[176] there was therefore no reason to "enlarge the judicial presence in the academic community"[177] by intruding on the historical prerogative of educators to act upon their expert evaluations of a student's academic performance.

Justice Rehnquist acknowledged that the deprivation suffered in

168. Board of Curators v. Horowitz, 435 U.S. at 80, 85.

169. *Id.* at 92 (Powell, J., concurring); *id.* at 96-97 (White, J., concurring in part and concurring in the judgment); *id.* at 97 (Marshall, J., concurring in part and dissenting in part); *id.* at 108 (Blackmun, J., joined by Brennan, J., concurring in part and dissenting in part).

170. *See* notes 186-201 and accompanying text *infra*.

171. 419 U.S. 565 (1975). *See* note 109 *supra*.

172. 435 U.S. at 97-108 (Marshall, J., concurring in part and dissenting in part).

173. *See, e.g.*, Mahavongsanan v. Hall, 529 F.2d 448 (5th Cir. 1976) (applicant who failed comprehensive examination twice and was not granted master's degree could not claim violation of due process); Gaspar v. Bruton, 513 F.2d 843 (10th Cir. 1975) (a nurse trainee possessed a property interest since she had paid a fee for education, but could not claim due process violation when decision to dismiss was made in good faith and was not arbitrary); Wright v. Texas S. Univ., 392 F.2d 728 (5th Cir. 1968) (colleges and universities are not subject to judicial review of application of academic standards); Mustell v. Rose, 282 Ala. 358, 211 So. 2d 489, *cert. denied*, 393 U.S. 936 (1968) (school authorities have absolute discretion to determine delinquency in studies); Bernard v. Inhabitants of Shelburne, 216 Mass. 19, 102 N.E. 1095 (1913) (a public hearing may be useless or harmful in finding out the truth as to scholarship).

174. Board of Curators v. Horowitz, 435 U.S. at 87-90.

175. *Id.* at 89-90.

176. *Id.*

177. *Id.*

cases of academic dismissal is more severe than that sustained in disciplinary suspensions.[178] The magnitude of the effect of state action on a private interest is one of the factors to be considered when assessing what process is due.[179] This factor was lightly treated by the majority in *Horowitz*, however, which concluded that the "evaluative nature of the inquiry and the significant and historically supported interest of the school in preserving its present framework for academic evaluations"[180] outweighed any right to a hearing under the Fourteenth Amendment. The result of this reasoning is somewhat anomalous in that fewer procedural safeguards are required when the deprivation is more severe. The majority assumed a modicum of "good faith" inherent in school officials' academic judgments,[181] an assumption challenged by Horowitz.[182] The Court withheld approval of several lower courts' dicta that academic dismissals might be reversed on substantive due process grounds if they were shown to be arbitrary and capricious.[183] While agreeing with the district court that no showing of arbitrariness or capriciousness had been made in Horowitz's case,[184] the Court implied that judicial review of the substantive aspects of academic dismissals would be improper.[185]

Justice Marshall, although agreeing with the majority's finding of the adequacy of the process afforded Horowitz,[186] criticized the majority's imprimatur of "far less stringent procedural requirements"[187] in cases of academic dismissal than in disciplinary cases.[188] He indicated

178. *Id.* at 86 n.3.

179. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319 (1976): "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 335.

180. 435 U.S. at 86 n.3.

181. *See id.* at 91-92 & nn.6 & 7.

182. *Id.* at 91. Horowitz alleged that her substantive rights were violated in that more stringent standards were applied to her performance because of her sex, religion and physical appearance. *Id.* at 92 n.7. The circuit court did not consider Horowitz's substantive claim, but ruled only that she had been denied adequate process. *Id.* at 91.

183. *See, e.g.*, Mahavongsanan v. Hall, 529 F.2d 448, 449 (5th Cir. 1976); Gaspar v. Bruton, 513 F.2d 843, 850 (10th Cir. 1975).

184. 435 U.S. at 92.

185. *Id.* The Court noted that "[c]ourts are particularly ill-equipped to evaluate academic performance." The factors which limit procedural requirements in cases of academic dismissal "speak *a fortiori*" to the substantive content of academic decision-making. *Id.*

186. *Id.* at 97-108 (Marshall, J., concurring in part and dissenting in part).

187. *Id.* at 99.

188. *Id.* at 97.

his concern over the Court's resolution of an issue not presented by the case;[189] this concern was echoed in the opinion of Justice Blackmun.[190] Both justices believed that the case should have been resolved solely on the basis of the demonstrated adequacy of the procedure utilized by the school.

Since the majority decided what process is due in cases of academic dismissal, Justice Marshall spoke to the issue from this perspective. He rejected the Court's dichotomy between "conduct" and "academic performance."[191] Using the circumstances which comprised Horowitz's allegedly defective clinical performance as an example,[192] he pointed out that there is considerable overlap between the two terms.[193] Moreover, he viewed the distinction as irrelevant and misfocused. The pertinent inquiry, according to Justice Marshall, should be whether the disputed facts are susceptible of resolution by third parties.[194]

Applying the factors enumerated in *Mathews v. Eldridge*,[195] Justice Marshall arrived at a different assessment of their relative weight than did the majority. First, he found that the interest involved in *Horowitz* was a weighty one: the possible deprivation of "a way of life to which [s]he ha[d] devoted years of preparation and on which [s]he . . . had come to rely."[196] Secondly, the risk of error in the assessment of Horowitz's hygiene and clinical expertise was not, in Justice Marshall's view, trivial.[197] And finally, the university had no greater interest in having a summary procedure than did the school administration in *Goss*.[198] Given this balance of factors, Justice Marshall concluded that an individual in Horowitz's position was entitled to more procedural

189. *Id.* at 107-08. Justice Marshall quoted the warning of Justice Brandeis in Ashwander v. TVA, 297 U.S. 288, 345-47 (1936) (Brandeis, J., concurring) against "anticipat[ing] a question of constitutional law in advance of the necessity of deciding it." 435 U.S. at 108.

190. 435 U.S. at 108-09 (Blackmun, J., joined by Brennan, J., concurring in part and dissenting in part).

191. *Id.* at 103-04 & n.18 (Marshall, J., concurring in part and dissenting in part).

192. *Id.* Horowitz's performance was allegedly inadequate in the areas of personal hygiene, peer and patient relations and timeliness.

193. *Id.*

194. *Id.* at 104-05 & n.18.

195. 424 U.S. 319, 335 (1976). *See* note 179 *supra*.

196. 435 U.S. at 100 (quoting Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1296-97 (1975)). Not only did Horowitz invest several years in medical training, but she had an offer of employment at the University of North Carolina, contingent upon her obtaining a Doctor of Medicine degree. Horowitz v. Board of Curators, 538 F.2d 1317, 1320 (8th Cir. 1976).

197. 435 U.S. at 101 (Marshall, J., concurring in part and dissenting in part).

198. *Id.* In *Goss* the petitioners were suspended for allegedly disruptive and disobedient conduct, including damage to school property. Goss v. Lopez, 419 U.S. 565, 569-70 (1975).

protection than the "informal give-and-take" prescribed by *Goss*.[199] Additional protection need not take the form of an adversarial hearing, however; Justice Marshall emphasized that the "appeal" procedure afforded Horowitz may have been better than a formal hearing in that it was tailored to resolve any unfairness or mistake in the assessment of Horowitz's abilities.[200] Justice Marshall concluded that the proper course would have been to remand the case for consideration of the remaining issues, particularly Horowitz's substantive due process claim.[201] Justice Blackmun concurred on this point.[202]

The majority's deferential view toward academic judgment received strong support from Justice Powell. He regarded clinical competence, including hygiene and other personal matters, as a component of academic performance, subject to the "widest range of discretion" in faculty judgment.[203] Voicing sharp disagreement with Justice Marshall's analysis, Justice Powell saw no parallel with the facts of *Goss*.[204] Justice White filed a brief opinion in which he indicated agreement with Justice Blackmun that the sufficiency of procedural due process afforded Horowitz rendered consideration of whether she had a constitutionally protectable interest superfluous.[205] He disagreed with the majority's view that academic dismissals required no procedural safeguards.[206]

III. Due Process Constraints on Creditor's Remedies

A. State Action

It is axiomatic that the Fourteenth Amendment's procedural protections apply only to those deprivations of life, liberty or property which are imposed by a governmental authority.[207] The task of determining whether such a deprivation has this requisite character is rela-

Justice Marshall reasoned that this type of conduct posed a greater threat to orderly school administration than did Horowitz's conduct. 435 U.S. at 101.

199. *Id.*

200. *Id.* at 102.

201. *Id.* at 107-08. In addition to the substantive due process claim, Horowitz contended that the school had not followed its own dismissal rules. *Id.* at 107 n.22.

202. *Id.* at 108-09 (Blackmun, J., joined by Brennan, J., concurring in part and dissenting in part).

203. *Id.* at 93-94, 96 & n.6 (Powell, J., concurring).

204. *Id.* at 94-95. Justice Powell considered the procedural protections of *Goss* to apply only to cases of "personal behavior." *Id.*

205. *Id.* at 96-97. (White, J., concurring in part and concurring in the judgment).

206. *Id.*

207. U.S. CONST. amend. XIV, § 1: "[N]or shall any *State* deprive any person of life, liberty, or property, without due process of law; . . ." (emphasis added).

tively simple when state law explicitly confers a property interest, as in statutes providing for teachers' tenure.[208] Where a property interest is not expressly conferred, state involvement in the denial of benefits[209] or in the transfer of property ownership[210] may still suffice to invoke the Fourteenth Amendment protections. Even if the state has no involvement with the termination or denial of a private interest, under certain circumstances financial connections between the state and a private entity,[211] or a private entity's "public function" status,[212] may invoke

208. *See, e.g.*, Perry v. Sindermann, 408 U.S. 593, 602 (1972); Board of Regents v. Roth, 408 U.S. 564, 577 (1972). It should be noted, however, that recent decisions have rendered the existence of a constitutionally protectable property interest difficult to ascertain, even when a state law purports to create such an interest. *See, e.g.*, Bishop v. Wood, 426 U.S. 341, 343-47 (1976) (policeman classified as a "permanent employee" held to retain his position at the will and pleasure of his employer); Arnett v. Kennedy, 416 U.S. 134 (1974) (statute which conferred a property interest in employment and also provided for no pretermination hearing held not to violate due process).

209. *See, e.g.*, Reitman v. Mulkey, 387 U.S. 369 (1967) (California state constitutional amendment repealing fair housing legislation and forbidding the passage of such legislation in the future constitutes state approval of racial discrimination and thus violates equal protection); Shelley v. Kraemer, 334 U.S. 1 (1948) (state court enforcement of a racially restrictive covenant in a deed violates equal protection).

210. *See, e.g.*, North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975) (state garnishment procedure that authorized issuance of garnishment order by a clerk upon creditor's affidavit violates due process); Fuentes v. Shevin, 407 U.S. 67 (1972) (prejudgment replevin procedure upon *ex parte* application and posting of bond by creditor violates due process); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) (prejudgment garnishment of wages upon filing of papers by creditor denies due process). *But see* Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974) (*ex parte* sequestration procedure under a vendor's lien does not violate the Fourteenth Amendment where the writ was issuable only by a judge on creditor's affidavit and where provision was made for an immediate hearing and for damages for wrongful levy).

211. *See, e.g.*, Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (racial discrimination by private restaurant violates equal protection where state ownership of building which housed both the restaurant and a state parking lot created interdependence and conferred mutual benefits). *See also* note 236 *infra.*

212. The "public function" doctrine refers to the concept of a private entity's equivalence to the state. In Marsh v. Alabama, 326 U.S. 501 (1946), the Court viewed ownership of an entire town by a private company as tantamount to being a municipality for Fourteenth Amendment purposes, including incorporation of the First Amendment. *Marsh* was followed in Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968), which held unconstitutional an injunction against union picketing of a store in a privately owned shopping center. *Logan Valley* was distinguished into virtual oblivion, however, by Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), and was overruled in Hudgens v. NLRB, 424 U.S. 507 (1976).

A private entity, such as a utility, which is heavily regulated, regarded as a governmentally-protected monopoly, and which exhibits a sufficiently close nexus between the state and its own actions may be subject to Fourteenth Amendment procedural requirements. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350-51 (1974). The status of a regulated monopoly alone does not convert a private utility's action into that of the state. Public Utilities Comm'n v. Pollak, 343 U.S. 451, 462 (1952). Where the private entity exercises

Fourteenth Amendment protections. In general, this relationship is more likely to be found when the issue is denial of equal protection or First Amendment rights than when it is the denial of due process.[213] In any case, the elements necessary for a finding of state action are unpredictable, as evidenced by the frequency with which the Court is confronted with the issue.[214]

In *Flagg Brothers v. Brooks*,[215] the Court was faced with the question of whether a warehouseman's sale of goods entrusted to him for storage, as authorized by New York's Uniform Commercial Code,[216] could be termed "state action" so as to invoke procedural safeguards under the Fourteenth Amendment. The goods in question had been stored in the Flagg Brothers, Inc. warehouse after Brooks' eviction from her apartment for nonpayment of rent; Brooks had agreed to Flagg's services, though complaining of the high price. Two months later, Brooks received notice that her belongings would be sold if she did not bring her account up to date within ten days.[217] She instituted

powers which were traditionally associated with the state, however, it may attain "public function" status. *See, e.g.*, Evans v. Newton, 382 U.S. 296 (1966) (municipal park); Marsh v. Alabama, 326 U.S. 501 (1946) (company town); Nixon v. Condon, 286 U.S. 73 (1932) (election). In Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), the Court did not require the observance of due process by a utility in terminating service because the threshold nexus between the state and the company's action was not established. The opinion noted that, "Metropolitan was a heavily regulated, privately owned utility, enjoying at least a partial monopoly in the providing of electrical service within its territory, and that it elected to terminate service to petitioner in a manner which the Pennsylvania Public Utility Commission found permissible under state law." *Id.* at 358. These factors were found insufficient to connect the utility's action to the state.

213. *See, e.g.*, Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961). *But see* Moose Lodge v. Irvis, 407 U.S. 163 (1972). Justice Marshall, dissenting in *Jackson*, *see* note 212 *supra*, pointed out that the majority's analysis could result in finding no constitutional violation if a utility refused to extend service to certain racial or other groups. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 373-74 (1974) (Marshall, J., dissenting). *See also* Norwood v. Harrison, 413 U.S. 455 (1973); Adickes v. S.H. Kress & Co., 398 U.S. 144, 190-91 (1970) (Brennan, J., concurring in part and dissenting in part).

214. As noted in Burton v. Wilmington Parking Auth., 365 U.S. 715, 723 (1961), the distinction between private and state action frequently admits of no easy answer. The nature of the state's involvement may not be immediately obvious and may require detailed inquiry.

215. 98 S. Ct. 1729 (1978).

216. N.Y.U.C.C. § 7-210 (McKinney 1962) provides for enforcement of a warehouseman's lien and specifies the procedures to be followed. Similar provisions have been adopted by a total of 49 states and the District of Columbia.

217. 98 S. Ct. at 1732. The circuit court opinion indicates that the city marshal who evicted Brooks told her she could not call someone to store her belongings, but that Flagg Bros. would do so. Brooks, apparently believing she had no choice, agreed to pay Flagg $65 per month for moving and storage. After her goods had been placed on the Flagg truck on June 13, she was told she must pay a total of $178 in various charges. She protested, but paid. Two days later, she was informed that she owed an additional $156 and, subsequently,

a class action under 42 U.S.C. § 1983[218] seeking damages, an injunction against the threatened sale, and a declaration that such sales violate due process and equal protection.[219] The district court dismissed the case on the grounds that the action taken by Flagg Brothers could not properly be attributed to the state, and so did not have to conform to the requirements of the Fourteenth Amendment.[220] The Second Circuit Court of Appeals reversed and remanded, holding that the New York code provision giving power to warehousemen to enforce liens by selling stored goods after notice, but without judicial determination of the amounts owing prior to the sale, rendered that action "under color of state law."[221] The court reasoned that by virtue of enacting the applicable Uniform Commercial Code section, the state had delegated its sovereign power over binding conflict resolution to warehousemen and had permitted the latter to assume a traditional state function, that of executing liens.[222] This involvement in the challenged activity was found sufficient to constitute state action and to invoke the procedural safeguards of the Fourteenth Amendment.

The Supreme Court disagreed. Justice Rehnquist, writing for the majority, examined the various theories upon which a finding of state action might have been based and found that the connection between Flagg Brothers' action and the state did not meet the requisites of any theory. He set forth two prerequisites for a claim under section 1983: (1) the deprivation of a right secured by the Constitution and the laws of the United States; and (2) action taken under color of state law.[223] In Justice Rehnquist's view, the test for determining whether a constitutionally protected right has been infringed differs from that employed to determine whether an action has been taken under color of state law.[224] Moreover, merely acting under the authority of a statute is not sufficient for state action; it is necessary to prove that the actions are

that another $75 would be due on July 1. On August 25, Brooks received notice that her goods would be sold unless she paid $306 within 10 days. Brooks v. Flagg Bros., 553 F.2d 764, 766-67 (2d Cir. 1977), *rev'd*, 98 S. Ct. 1729 (1978).

218. 42 U.S.C. § 1983 (1976). *See* note 108 *supra*. Brooks was joined by named plaintiff Jones whose goods had been stored by Flagg Bros. following eviction. The American Warehousemen's Association, the International Association of Refrigerated Warehouses, Inc. and the New York Attorney General moved to intervene as defendants. 98 S. Ct. at 1732.

219. 98 S. Ct. at 1732.

220. *Id.*

221. Brooks v. Flagg Bros., 553 F.2d 764, 774 (2nd Cir. 1977), *rev'd*, 98 S. Ct. 1729 (1978). The court found that the "under color of state law" provision of § 1983 was equivalent to the state action requirement of the Fourteenth Amendment. *Id.* at 766 & n.2.

222. *Id.* at 771.

223. 98 S. Ct. at 1733 (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970)).

224. *Id.* It is essential that a private entity act with knowledge of and pursuant to a

properly attributable to the state.[225] State permission for private action, even though embodied in statutory form, does not necessarily involve the state to an extent sufficient to require Fourteenth Amendment protections. Only actual statutory compulsion suffices to implicate the state in private actions which deprive individuals of their property.[226] In contrast, compulsion through the direct involvement of a state official would satisfy both prerequisites to a section 1983 action.[227] Absent statutory compulsion or actual participation of a government official in the deprivation, only the presence of narrowly drawn criteria will permit the attribution of private action to the state.

The *Flagg* majority found that the remedy afforded warehousemen under New York law did not fall within the limited parameters of the "public function" doctrine.[228] Justice Rehnquist delineated two main branches of this theory: election[229] and municipal function cases.[230] The common denominator of the two lines of cases was found to be the exclusive nature of each function.[231] Thus, if the power delegated to Flagg Brothers could be viewed as traditionally the exclusive

statute to satisfy the "under color of state law" requirement of § 1983. Adickes v. S.H. Kress & Co., 398 U.S. 144, 162 n.23 (1970).

225. 98 S. Ct. at 1733. In contrast, the Second Circuit Court of Appeals viewed the "under color of state law" requirement of § 1983 as equivalent to the state action prerequisite of the Fourteenth Amendment. Brooks v. Flagg Bros., 553 F.2d at 766 n.2. Other courts have also treated the two concepts as virtually synonymous. *See, e.g.*, Reitman v. Mulkey, 387 U.S. 369, 376 (1967); United States v. Price, 383 U.S. 787, 794 n.7 (1966); Culbertson v. Leland, 528 F.2d 426 (9th Cir. 1975); Palmer v. Columbia Gas, 479 F.2d 153 (6th Cir. 1973); Tedeschi v. Blackwood, 410 F. Supp. 34 (D. Conn. 1976); Barber v. Rader, 350 F. Supp. 183 (S.D. Fla. 1972).

226. 98 S. Ct. at 1738. Justice Rehnquist's permission-compulsion distinction was severely criticized in Justice Stevens' dissenting opinion. He noted that the majority's reliance on Moose Lodge v. Irvis, 407 U.S. 163 (1972) to support the distinction was misplaced since "[e]ven *Moose Lodge* . . . recognize[d] that there are many intervening levels of state involvement in private conduct." *Id.* at 1741 & n.4 (Stevens, J., joined by White & Marshall, JJ., dissenting). *See also* Watson v. Branch County Bank, 380 F. Supp. 945 (W.D. Mich. 1974). *But see* Phillips v. Money, 503 F.2d 990 (7th Cir. 1974), *cert. denied*, 420 U.S. 934 (1975); James v. Pinnix, 495 F.2d 206 (5th Cir. 1974).

227. 98 S. Ct. at 1734 & n.5.

228. *See* note 212 *supra*.

229. 98 S. Ct. at 1734. Under this line of cases, state action is present in state-regulated elections or elections which, in practice, produce the uncontested choice of public officials. *See, e.g.*, Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); Nixon v. Condon, 286 U.S. 73 (1932). Justice Rehnquist obliquely challenged the basis of these holdings, stating their rationale "may be subject to some dispute." 98 S. Ct. at 1734 & n.6.

230. 98 S. Ct. at 1734-35. The municipal function cases are now restricted to situations where a private entity has assumed all the attributes of a municipality, *i.e.* is the "functional equivalent" of a municipality. Hudgens v. NLRB, 424 U.S. 507 (1976).

231. 98 S. Ct. at 1735-36.

prerogative of the state, state action might be found present. In distinguishing *Flagg* from the two branches of the public function doctrine, Justice Rehnquist noted that other methods of dispute settlement remained open to Brooks, whereas all other options were precluded in election and municipal function cases.[232] In any case, the settlement of disputes between creditors and debtors was found not to be a power or duty exclusively reserved to the sovereign.[233] The majority saw this area as fundamentally private, arising out of the traditional remedy of self-help, though modified and authorized by statute.[234] It declined to broaden the concept of state action to encompass what it considered to be a facet of property law.[235]

The Court reaffirmed the validity of prior decisions which invalidated on equal protection grounds state and municipal programs benefiting private schools which practiced racial discrimination.[236] As noted in *Norwood v. Harrison*,[237] "A state may not grant the type of tangible financial aid here involved if that aid has a significant tendency to facilitate, reinforce and support private discrimination."[238] No financial aid was involved in *Flagg*, however, even though the "benefit" conferred upon warehousemen by virtue of state acquiescence in execution of liens may have the same general effect in facilitating unfair and arbitrary deprivations of property.[239]

Justice Stevens, dissenting, rejected the dichotomy perceived by the majority between action taken under color of state law and action

232. *Id.* Among Brooks' and Jones' options, according to the majority, were: (1) seeking a waiver of Flagg Brothers' right to sell the goods at the time they agreed to the storage, (2) replevin in cases of unauthorized storage, and (3) seeking damages for any violations of New York Uniform Commercial Code § 7-210. Justice Marshall presented a cogent counterargument to the perceived availability of the second option. *See* note 259 and accompanying text *infra*.

233. 98 S. Ct. at 1735-36.

234. *Id.* at 1737 n.12.

235. *Id.* at 1735-36 n.10.

236. *E.g.*, Gilmore v. City of Montgomery, 417 U.S. 556 (1974) (upholding injunction against exclusive access to city recreational facilities by segregated private schools and affiliates); Norwood v. Harrison, 413 U.S. 455 (1973) (invalidating state program which loaned textbooks to students regardless of whether students attended schools with racially discriminatory policies).

237. 413 U.S. 455 (1973).

238. *Id.* at 466.

239. Some courts have indicated reluctance to analyze the presence of state action in due process claims with the same degree of diligence they would employ in racially-based equal protection claims. *See, e.g.*, James v. Pinnix, 495 F.2d 206 (5th Cir. 1974); Parks v. "Mr. Ford," 386 F. Supp. 1251, 1265 (E.D. Pa. 1974), *aff'd in part and rev'd in part*, 556 F.2d 132 (3d Cir. 1977). *See* note 213 and accompanying text *supra*.

depriving an individual of a right protected under the Constitution.[240] In his view, the issue was whether "a state statute which authorizes a private party to deprive a person of his property without his consent must meet the requirements of the Due Process Clause of the Fourteenth Amendment."[241] The same test of state involvement should apply to a section 1983 claim as to a Fourteenth Amendment violation.[242] The paramount consideration of whether due process constrictions should apply was, in Justice Stevens' opinion, generally "whether the State has delegated a function traditionally and historically associated with sovereignty."[243] As applied to the instant case, the question turned on "the significance of the States' role in defining *and controlling* the debtor–creditor relationship."[244] The rationale for this view was found in cases dealing with debtor–creditor relationships.[245] Justice Stevens found the majority's attempt to distinguish these cases on the basis of overt official involvement in the deprivation of property "baffling."[246] The finding of state action there was predicated on a *lack* of state control over the resolution of commercial disputes, not on the "purely ministerial" actions of "minor governmental functionaries."[247] To adopt the majority's interpretation of the basis for such cases as *North Georgia Finishing, Inc. v. Di-Chem, Inc.*,[248] *Fuentes v. Shevin*[249] and *Sniadach v. Family Finance Corp.*[250] would, in Justice Stevens' opinion, invert the requirements for state action. It would actually expand the reach of state action in many cases by imbuing private acts with official significance merely because a state official performed some ministerial function.[251] By the same token, to deny state action where

240. 98 S. Ct. at 1741, 1744 n.14. (Stevens, J., joined by White & Marshall, JJ., dissenting). Justice Stevens indicated that it would be proper to analyze the requirements separately in cases where the private entity deviated from statutory requirements, for in that case, the action taken would not be under color of state law. *Id.* at 1744 n.14. *See* note 254 and accompanying text *infra*.

241. 98 S. Ct. at 1740.

242. *See* note 240 and accompanying text *supra*.

243. 98 S. Ct. at 1741 (citing Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353 (1974); Evans v. Newton, 382 U.S. 296, 299 (1966)).

244. *Id.* at 1743 (emphasis in the original).

245. *Id.* (citing Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969)). *See* note 210 and accompanying text *supra*.

246. 98 S. Ct. at 1742.

247. 98 S. Ct. at 1742. In North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975), a court clerk issued a writ authorizing the garnishment of property. A sheriff participated in the replevin of property in Fuentes v. Shevin, 407 U.S. 67 (1972).

248. 419 U.S. 601 (1975).

249. 407 U.S. 67 (1972).

250. 395 U.S. 337 (1969).

251. 98 S. Ct. at 1743. Justice Stevens cited ministerial functions in connection with the

even "mechanical supervision" over private nonconsensual resolution of disputes was lacking would controvert the clear intent of *Fuentes* and *North Georgia Finishing, Inc.*[252] These cases were directed at curbing the private use of state power to achieve nonconsensual conflict resolution. Where a statute authorizes such a private exercise of state power, Justice Stevens reasoned that the constitutionality of the process is reviewable in a section 1983 action.[253] If, however, the deprivation of property is not undertaken pursuant to statute, the private entity would not be acting under color of state law and a section 1983 action would not lie.[254] In Justice Stevens' opinion, the nature of the delegated power should be the determinant of whether state action is present rather than whether the power is exclusively public.[255] The sovereign power to order binding conflict resolution is part of the "framework of rules" which govern our commercial transactions;[256] consequently, the concept of a fair and ordered society requires that this power be exercised responsibly, in observance of constitutional restrictions.[257]

Although joining Justice Stevens' opinion, Justice Marshall wrote a separate dissent decrying the Court's "callous indifference to the realities of life for the poor."[258] He noted that although alternative means of resolving conflicts over stored property exist, in practicality the option of replevin is not available to indigents.[259] The due process re-

transfer of motor vehicle or real estate ownership as examples of the "legion" number of such situations. *Id.* & n.12.

252. *Id.* at 1743.

253. *Id.* at 1744.

254. *Id.* & n.14. *See* note 240 *supra.*

255. *Id.* at 1744.

256. *Id.* at 1745 (quoting Mitchell v. W.T. Grant, 416 U.S. 600, 624 (1974) (Powell, J., concurring)).

257. *Id.* In a footnote, Justice Stevens quoted Justice Harlan's explanation of this principle appearing in Boddie v. Connecticut, 401 U.S. 371 (1971). 98 S. Ct. at 1744 n.17. In the context of resolution of marital disputes through divorce, Justice Harlan noted, "It is to courts, or other quasi-judicial official bodies, that we ultimately look for the implementation of a regularized, orderly process of dispute settlement. Within this framework, those who wrote our original Constitution . . . recognized the centrality of the concept of due process in the operation of this system. Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things." Boddie v. Connecticut, 401 U.S. at 375.

258. 98 S. Ct. at 1739 (Marshall, J., dissenting). Justice Marshall also emphasized the importance of historical tradition in determining whether a challenged action could be attributed to the state. He cited numerous instances in which execution of a lien had been held the traditional function of state officials. This led him to conclude that the majority's approach departed from historical precedent. *Id.*

259. *Id.* Plaintiff Jones alleged that she had not authorized Flagg Brothers to store her

quirements of notice and hearing are directed toward avoiding mistaken or arbitrary deprivations of protected interests. If an individual had not authorized storage of goods, a hearing would be likely to uncover that fact and provide for return of the possessions. In situations such as Brooks', however, where the storage was authorized, additional process may not avoid forced sale if a contract which describes in full all liabilities which the storing party may incur has been signed.[260] Under such circumstances, some courts have held that the authority for seizure of property is the private contract, not the existing state statute, and that the seizure is therefore not under color of state law.[261] In fact, the district court opinion in *Brooks* went even further, approving enforcement of statutory liens where the parties' contract made no provision for sale, on the grounds that the statute permitted, but did not compel, the seizure of property.[262]

The Supreme Court's decision in *Flagg* suggests a general narrowing of the concept of state action, but little clarification of the circumstances that will support a section 1983 action.[263] The Court did refer to the Ninth Circuit Court of Appeals' reasoning in *Melara v. Kennedy*,[264] which held that the execution of a warehouseman's lien was not state action. *Melara* noted several important factors which dictated against a finding of state action in the relationship between warehousemen and debtors: (1) the relationship between the property involved and the underlying debt;[265] (2) the existence of a contract

possessions. The majority opinion noted that she could "replevy her goods at any time under state law." *Id.* at 1735. Justice Marshall pointed out that New York law required an individual seeking replevin to post an undertaking from a surety for not less than twice the value of the goods. A surety would demand a substantial advance payment and assurance of the debtor's ability to pay any judgment awarded, neither of which could be produced by an indigent who had just been evicted from her apartment. In reality, then, Jones had no choice but to allow Flagg Brothers to keep the goods. *Id.* at 1739.

260. The circuit court noted, however, that Brooks was not apprised of full charges and the possibility of sale of the goods upon default until six days after the initial storage when she received a "Combined Uniform Household Goods Bill of Lading and Freight Bill." Brooks v. Flagg Bros., 553 F.2d at 767 & n.3.

261. *See, e.g.*, Melara v. Kennedy, 541 F.2d 802, 807 (9th Cir. 1976); Barrera v. Security Bldg. & Inv. Corp., 519 F.2d 1166 (5th Cir. 1975); Fletcher v. Rhode Island Hosp. Trust Nat'l Bank, 496 F.2d 927 (1st Cir.), *cert. denied*, 419 U.S. 1001 (1974); Shirley v. State Nat'l Bank, 493 F.2d 739 (2nd Cir.), *cert. denied*, 419 U.S. 1009 (1974).

262. Brooks v. Flagg Bros., 404 F. Supp. 1059 (S.D.N.Y. 1975), *aff'd*, 98 S. Ct. 1729 (1978).

263. *See* notes 240-57 and accompanying text *supra*.

264. 541 F.2d 802 (9th Cir. 1976). *Melara* was factually similar to *Flagg* and upheld CAL. COM. CODE § 7210 (West 1977), the counterpart to the New York statute challenged in *Flagg*.

265. *Id.* at 807. The *Melara* court found that the statute had not granted private individuals the "power to exercise a roving commission to satisfy an unrelated debt." *Id.* It viewed

which provided notice to the debtor of the creditor's potential exercise of his legal rights;[266] and (3) enforcement of the lien by peaceful means, without resort to entry into another's home.[267] Insofar as the Court did not disagree with *Melara*, these considerations may give some guidance in analyzing the presence of state action in the resolution of debtor–creditor disputes. The concept of state action after *Flagg*, however, remains elusive.

B. Proper Notice

The presence of state action was not at issue in *Memphis Light, Gas & Water Division v. Craft*,[268] having been resolved in the affirmative by the circuit court of appeals and not challenged by the utility before the Supreme Court.[269] The circuit court found that *Jackson v. Metropolitan Edison Co.*[270] did not control because Metropolitan Edison was privately owned and operated. In contrast, municipal ownership and control of Memphis Light, Gas & Water (MLG&W) rendered its actions attributable to the state.[271]

The Court did, however, analyze the claim of entitlement to continued utility service advanced by the Crafts to determine whether it was "property" protected by the due process clause.[272] Since Tennessee law permitted termination of service only for cause, such as nonpayment of a just service bill, a customer who disputed the amount owed could assert a legitimate claim of entitlement, provided he tendered any undisputed amounts.[273] Having concluded that the Crafts had satisfied the threshold requirements for a suit under section 1983,[274] the Court turned to a consideration of what process is due in cases of disputed charges for utility service.

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a warehouseman's interest in stored property to be similar to the interest retained by a conditional seller of goods.

266. *Id.*

267. *Id.* at 807-08. Since the stored goods are already in the physical possession of the warehouseman, their sale involves no seizure or entry into the home.

268. 98 S. Ct. 1554 (1978).

269. *Id.* at 1559 & n.6.

270. 419 U.S. 345 (1974). *See* note 212 *supra.*

271. Craft v. Memphis Light, Gas & Water Div. (MLG&W), 534 F.2d 684, 687 (6th Cir. 1976), *aff'd*, 98 S. Ct. 1554 (1978).

272. Property interests are created and defined by sources independent of the Constitution, such as state law or contract. Board of Regents v. Roth, 408 U.S. 564, 577 (1972). *See* note 208 *supra.*

273. 98 S. Ct. at 1560-61 & nn.9-11. The Court noted that "the Fourteenth Amendment's protection of 'property' . . . has never been interpreted to safeguard only the rights of undisputed ownership." *Id.* at 1561 (quoting Fuentes v. Shevin, 407 U.S. 67, 86 (1972)).

274. *See* notes 223-25 and accompanying text *supra.*

The Crafts' billing dispute arose when they moved into what had previously been a duplex with two separate gas and electric meters. Confusion ensued over double billings despite the Crafts' attempts to consolidate the meters and their good faith efforts to resolve the problem with MLG&W. The Crafts' attempts to reach an understanding with MLG&W were unavailing and their service was disconnected five times.[275] The bills sent to the Crafts had stated only that their payment was overdue and that service would be discontinued if payment was not received by a specified date.[276]

The Supreme Court affirmed the circuit court's ruling that the due process clause required that termination notices inform the customer of the existence of a procedure for challenging a disputed bill and that there be an established procedure for resolution of such disputes.[277] Justice Powell, writing for the Court, relied on *Mullane v. Central Hanover Bank & Trust Co.*[278] for the proposition that notice must be reasonably calculated to inform interested parties of the action and to afford them an opportunity to object.[279] Although the Crafts were informed of the pending termination of service in time to avert it by paying the bill, the notice was held to be defective in that it did not advise them of the existence of a procedure for contesting the charges.[280]

Justice Stevens, dissenting, disagreed with the majority's interpretation of *Mullane*. In his view, to "afford [interested parties] an oppor-

275. 98 S. Ct. at 1558.

276. *Id.* at 1562.

277. *Id.* at 1567.

278. 339 U.S. 306 (1950).

279. *Id.* at 314.

280. 98 S. Ct. at 1563. The Court analyzed the case within the framework established in Mathews v. Eldridge, 424 U.S. 319 (1976). Under the balancing approach outlined there, *id.* at 334-35, the Court found that the customer's interest was substantial, given the necessity of utility service; that the risk of an erroneous deprivation was not insubstantial, due to the reliance on computers; and that the utility's interests were not incompatible with affording a pre-termination hearing, based on its own business interests in producing satisfactory service. MLG&W v. Craft, 98 S. Ct. at 1564-65. The Court concluded that the provision of "some kind of hearing" would not prove burdensome. *Id.* at 1565.

The majority considered appropriate notice to include provisions of where, during which hours of the day, and before whom disputed bills could be discussed. This information should be included in cut-off notices. *Id.* at 1563 n.15.

The Court also rejected the utility's claim that the available common law remedies of a pre-termination injunction, a post-termination suit for damages, and a post-payment action for a refund were sufficient to cure any defect in its procedures. *Id.* at 1566. Noting that "[j]udicial remedies are particularly unsuited to the resolution of factual disputes typically involving sums of money too small to justify engaging counsel or bringing a lawsuit," the Court found the proffered alternatives to be inadequate. *Id.* at 1566. The majority concluded that "an informal administrative remedy . . . constitutes the process that is 'due.'" *Id.*

tunity to present their objections"[281] meant only that notice be given in time for a party to defend.[282] He rejected the "paternalistic" assumption that a customer should be "told how to complain about an error in a utility bill."[283] Where deprivation of property must be preceded by a formal hearing, notice must include the time and place for the hearing.[284] Since, however, the majority had expressly recognized that all that was necessary in the instant case was an opportunity to meet with a "responsible employee empowered to resolve the dispute,"[285] this requirement was, in his opinion, inapplicable.

The facts in *Craft* are unclear as to exactly what procedure was followed by MLG&W in cases of disputed charges, and whether the procedure which existed was made available to the Crafts.[286] As pointed out by Justice Stevens, it may even be that the Crafts were afforded exactly the type of process prescribed by the Court.[287] Nevertheless, the Court reiterated the balancing test set forth in *Mathews v. Eldridge*[288] to determine what process was due in this case. It found that consumers possess a substantial interest in the continuance of essential services[289] and that considerable risk of erroneous deprivation exists.[290] Justice Powell viewed the requirement of "some administra-

281. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

282. 98 S. Ct. at 1568 (Stevens, J., joined by Burger, C.J., & Rehnquist, J., dissenting).

283. *Id.* at 1569.

284. *Id.*

285. *Id.* at 1565.

286. The district court explained the MLG&W procedures for resolution of disputed bills: " 'Credit counselors assist customers who have difficulty with payments or disputes concerning their bills with MLG&W. If these counselors cannot satisfy the customer, then the customer is referred to management personnel; generally the chief clerk in the department; then the supervisor in credit and collection. In addition, a dissatisfied customer may appeal to the Board of Commissioners of MLG&W as to complaints regarding bills, service, termination of service or any other matter relating to the operation of the Division.' " *Id.* at 1558 n.4.

Despite the existence of the dispute resolution procedure, the majority found that the opportunity to talk with management was never adequately explained to Mrs. Craft on the numerous occasions she visited MLG&W's offices to protest double billing. *Id.* at 1558. In contrast, the dissenters found that Mrs. Craft did meet with employees of the utility empowered to resolve the dispute. *Id.* at 1568 n.6 (Stevens, J., dissenting).

287. *Id.* at 1568 n.7. Justice Stevens pointed out that "[t]he Due Process Clause does not guarantee a correct or a courteous resolution of every dispute." *Id.*

288. 424 U.S. 319, 334-35 (1976). *See* note 280 *supra.*

289. 98 S. Ct. at 1564. The majority noted that deprivation of heat or water for even a short period of time may threaten health and safety, working a "uniquely final deprivation." *Id. Cf.* Stanley v. Illinois, 405 U.S. 645, 647-48 (1972).

290. 98 S. Ct. at 1564-65. Justice Powell acknowledged the fallibility of computers and the concomitant risk of an erroneous deprivation of service.

tive procedure for entertaining customer complaints"[291] as compatible with the utility's interests in maintaining customer goodwill and avoiding injury.[292] Given the loosely structured mandate of the Court, it appears that the majority was merely reaffirming what is the general practice of utilities. According to common law and Tennessee decisional law, a utility which terminates a customer's service for nonpayment of a disputed bill runs the risk of liability for damages if the customer is proven correct.[293] The fact that the *Craft* majority felt it necessary to require the establishment of a dispute resolution procedure may indicate its underlying concern that those who were most likely to suffer termination of utility services would probably not be aware of the existence of such a remedy.[294] Even if a customer was aware of the availability of damages for wrongful termination, the Court recognized the impracticability of instituting a suit for the small sums involved.[295]

The dissenters viewed the damage remedy as the most effective deterrent against erroneous termination of utility service.[296] They also made the well-taken point that "[j]ust what . . . additional procedural safeguards are constitutionally required is most difficult to discern."[297] This was particularly apt in view of the circuit court's reliance on its

291. *Id.* at 1564.

292. *Id.* at 1565. He pointed out that the limited procedures recommended by the Court should not prove burdensome to the utility.

293. At common law, both private utilities and municipalities retained the privilege of terminating service for nonpayment of just charges. *See, e.g.*, Oklahoma Natural Gas Co. v. Young, 116 F.2d 720 (10th Cir. 1940); Schultz v. Town of Lakeport, 5 Cal. 2d 377, 54 P.2d 1110 (1936). The privilege is subject to an exception or qualification when a *bona fide* dispute exists, however. A public service company which terminates service is liable for compensatory and, in some cases, punitive damages if the consumer proves to have been correct. *See, e.g.*, Sims v. Alabama Water Co., 205 Ala. 378, 380, 87 So. 688, 690 (1920).

Consumers who wish to retain service while the dispute is being resolved may pay the disputed charges and sue for recovery or, in some jurisdictions, obtain an injunction against discontinuance or a writ of mandamus to compel restoration of service. Sims v. Alabama Water Co., 205 Ala. 378, 87 So. 688 (1920).

294. Justice Powell viewed the common law remedies, *see* note 293 *supra*, as inadequate substitutes for pre-termination review of a disputed bill. 98 S. Ct. at 1566. *See* note 280 *supra*. The remedies of injunctive relief or recovery of overpayments are themselves bounded by procedural requirements, delay, and burdensome, though temporary, additional expense. 98 S. Ct. at 1566.

295. 98 S. Ct. at 1566. This same impracticability, as applied to a utility's remedies for nonpayment, underlies the privilege to terminate service. *Id.* at 1566 n.27.

296. *Id.* at 1570 (Stevens, J., joined by Burger, C.J., & Rehnquist, J., dissenting). The dissenters intimated that the procedures suggested by the majority lacked the force that the damage threat supplied in insuring "careful attention to genuine customer disputes." *Id.*

297. *Id.* at 1569 (footnote omitted).

holding in *Palmer v. Columbia Gas*,[298] which had required stringent procedures for termination of utility service.[299] Though affirming the circuit court's holding, the majority in *Craft* did not mandate the procedures specified in *Palmer*.[300]

The dissent closed on a somewhat provocative note. Justice Stevens stated, "I do not believe the Constitution requires the State to employ procedures that are so simple that every lay person can always act effectively without the assistance of counsel."[301] Given the expense of retaining counsel, however, it can be questioned whether safeguarding the continuance of a necessity of life such as utility service should depend on one's ability to pay attorneys' fees.

IV. Jurisdiction

A. Minimum Contacts

Ever since the Supreme Court decided *Pennoyer v. Neff* in 1877,[302]

298. 479 F.2d 153 (6th Cir. 1973). *Palmer* involved a billing procedure by which the charge for several months was based on computer-estimated usage. When the meter was periodically read, the difference between actual usage and the estimate sometimes amounted to a considerable sum. Consumers who did not pay two consecutive monthly bills were given a shut-off notice. Five days after such notice, service was terminated if no payment had been received. Due to the company's inefficiency, significant mistakes were frequently made, such as mistaken termination of service to consumers who had already paid. The *Palmer* record also indicated a "shockingly callous and impersonal attitude upon the part of [the company], which relied uncritically upon its computer." *Id.* at 158.

299. *Id.* at 159-60, 166-69. *Palmer* required personal delivery of cutoff notices or delivery by certified mail, return receipt requested. The notice must specify available credit programs and dispute-resolving mechanisms. A pre-termination hearing must be held, conducted by an employee in a management position.

300. One obvious difference between *Palmer* and *Craft* is that *Craft* merely required that a customer disputing a bill be afforded an opportunity to meet with "designated" employees who were authorized to review disputed bills. Memphis Light, Gas & Water Div. v. Craft, 98 S. Ct. at 1562 n.13. In *Palmer*, the court required management intervention in the resolution of disputes because clerks, who also performed a collection function, were "hostile, arrogant, and unyielding." Palmer v. Columbia Gas, Inc., 479 F.2d at 168.

301. 98 S. Ct. at 1571 (Stevens, J., joined by Burger, C.J., & Rehnquist, J., dissenting). Apparently, Justice Stevens regarded the *Crafts'* predicament as a rare and trivial occurrence, unworthy of constitutional inquiry. He noted that MLG&W processed more than 30,000 complaints of excess charges each year, most of which were, presumably, satisfactorily resolved. *Id.* at 1569. If a customer failed to gain such a resolution and a sufficient emergency existed, he would be amply motivated to consult counsel or file suit. *Id.* at 1570. With an attitude reminiscent of that of Marie Antoinette, he remarked, "A potential loss of utility service sufficiently grievous to qualify as a constitutional deprivation can hardly be too petty to justify invoking the aid of counsel or the judiciary." *Id.*

302. 95 U.S. 714 (1877). *Pennoyer* established, *inter alia*, the concept of quasi-in-rem jurisdiction. By attaching a non-resident defendant's property located in the forum state, a court of that state can assume jurisdiction over the defendant to adjudicate his rights in the property. *Id.* at 723. This form of jurisdiction is based on notions of traditional state power

the circumstances which justify a court's assertion of personal jurisdiction over a defendant have been a source of contention.[303] Despite some expansion of *Pennoyer*'s concept of quasi-in-rem jurisdiction in early cases such as *Harris v. Balk*,[304] that doctrine has been subject to criticism over the years.[305] Last term, in *Shaffer v. Heitner*,[306] the Court greatly restricted quasi-in-rem jurisdiction by requiring more than the mere "statutory presence of [defendants'] property" within a state to confer jurisdiction.[307] The Court held the appropriate test for jurisdiction to be the "minimum contacts" standard of *International Shoe Co. v. Washington*.[308] This standard requires case-by-case analyses of the factors which influence the "fundamental fairness" of asserting jurisdiction over a defendant:

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over persons and property within its borders. *Id.* at 722-23. Thus, quasi-in-rem jurisdiction gives a court the power to resolve personal disputes because of its power over the property, even though that property is unrelated to the claim being litigated. A judgment based on quasi-in-rem jurisdiction may not exceed the value of the attached property, however, and adequate notice to the non-resident defendant is essential for assumption of quasi-in-rem jurisdiction. *Id.* at 730-32.

303. *Compare* Hanson v. Denckla, 357 U.S. 235 (1958); *with* Atkinson v. Superior Court, 49 Cal. 2d 338, 316 P.2d 960 (1957), *cert. denied*, 357 U.S. 569 (1958); also, *compare* Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961) *with* Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502 (4th Cir. 1956).

304. 198 U.S. 215 (1905). The Court in *Harris* held that the situs of a debt is that of the debtor. Personal jurisdiction over a non-resident defendant could therefore be obtained by garnishing a debt owed to the defendant while the debtor was in the forum state, even though temporarily. *See also* Seider v. Roth, 17 N.Y. 2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966) (attachment of insurance company's contractual promise to defend its insured conferred jurisdiction over non-resident).

305. *See, e.g.*, Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241; von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966).

306. 433 U.S. 186 (1977).

307. *Id.* at 213. *Shaffer* was a shareholder's derivative suit filed in Delaware against the Greyhound Corporation, its subsidiary Greyhound Lines, and 28 present or former officers or directors. Neither the plaintiff nor any defendant resided in Delaware, but jurisdiction over the defendants was asserted based on a statute which established Delaware as the situs of ownership of stock in companies, such as Greyhound, incorporated in Delaware. DEL. CODE tit. 8, § 169. The stock owned by defendants was sequestered, even though the certificates were not located in Delaware, thus conferring quasi-in-rem jurisdiction on the Delaware court. The Supreme Court held the asserted jurisdiction unconstitutional because the stock was neither the subject matter of the litigation nor related to the underlying cause of action. The Court stated that, "[t]he fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification. Its continued acceptance would serve only to allow state-court jurisdiction that is fundamentally unfair to the defendant." 433 U.S. at 212. The Court therefore concluded that all assertions of state-court jurisdiction must meet the minimum contacts standard of International Shoe v. Washington, 326 U.S. 310 (1945). *Id. See generally* notes 308-09 and accompanying text *infra*.

308. 326 U.S. 310 (1945).

> Whether due process is satisfied must depend . . . upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations.[309]

Some situations which have been held to establish "minimum contacts" are: a cause of action arising from an act done or transaction consummated in the forum state;[310] a contract which has a substantial connection with the forum state;[311] derivation of substantial economic benefit from the sale and use of one's products in the forum state;[312] or some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.[313] Although the viability of quasi-in-rem jurisdiction may be limited after *Shaffer*, the presence of property within the forum state may properly be viewed as one of the contacts. It appears clear, however, that the mechanical assertion of quasi-in-rem jurisdiction, as in cases such as *Harris v. Balk*,[314] is no longer constitutional. Rather, each case must be analyzed to determine whether the requisite contacts are present.

The Court's latest decision on the subject of minimum contacts, rendered in *Kulko v. Superior Court*,[315] further limits state courts' assertions of jurisdiction over non-resident defendants who have little, if any, connection with the forum state. Justice Marshall, writing for the majority, reversed the judgment of the California Supreme Court and ruled that, under the facts of the case, the exercise of personal jurisdiction would violate due process.

309. *Id.* at 319.

310. *See, e.g.*, Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E. 2d 761 (1961) (jurisdiction over foreign corporation held proper where cause of action arose from defendant's negligence in manufacturing a water heater which exploded in the forum state).

311. *See, e.g.*, McGee v. International Life Ins. Co., 355 U.S. 220 (1957) (foreign insurance company subject to suit in state where its contract was solicited and delivered to insured).

312. *See, e.g.*, Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1951) (defendant Philippine corporation could be sued in Ohio on a cause of action unrelated to the state by a non-resident plaintiff based on the corporation's continuous and systematic business within Ohio).

313. *But cf.* Hanson v. Denckla, 357 U.S. 235 (1958) (trustee had no purposeful affiliation with state of decedent's domicile and so could not be subjected to the jurisdiction of the state's courts).

314. 198 U.S. 215 (1905). *See* note 304 *supra*.

315. 98 S. Ct. 1690 (1978).

Ezra Kulko challenged California's assertion of jurisdiction in an action to increase his child support obligation. His only personal contacts with California were brief and had occurred years before his ex-wife moved to San Francisco.[316] Their separation agreement had been drawn up and signed in New York, and the divorce was procured in Haiti. The separation agreement provided that Kulko would retain custody of his two children during the school year, but that they would spend holidays and summers with their mother. Sharon Kulko Horn[317] was to receive $3,000 per year as child support to cover the periods when the children were in her custody. After a year, the Kulkos' daughter decided to reside in California with her mother, and Kulko bought her a one-way plane ticket. Two years later, the other child telephoned his mother expressing the same desire;[318] thereupon Horn sent him a plane ticket without consulting Kulko. Horn reasoned that the child support payments had become inadequate to provide for the expanded time during which she was responsible for the children's care. She therefore petitioned to establish the Haitian divorce decree as a California judgment, to modify the judgment so as to award her full custody of the children, and to increase Kulko's child support obligation.[319] Kulko moved to quash service, which motion was denied by the trial court. The court of appeals affirmed[320] on the basis of its interpretation of California's jurisdictional statute, which provides: "A court of this State may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."[321] This statute has been interpreted to confer personal jurisdiction on a court when the defendant has caused an effect in the state by an act or omission which occurs elsewhere.[322] The court reasoned that by allowing his children

316. *Id.* at 1694. The Kulkos were married in California in 1959 during a three-day stay. Both parties were domiciled in and residents of New York State. After the separation in 1972, Sharon Kulko moved to San Francisco.

317. Sharon Kulko remarried shortly after the divorce. *Id.* She will hereinafter be referred to as "Horn."

318. Noted by the California Supreme Court but not considered by Justice Marshall was the fact that Kulko's son telephoned his mother stating that he was in trouble, that his father did not want him, and that he wished to live in San Francisco with his mother. Kulko v. Superior Court, 19 Cal. 3d 514, 520, 564 P.2d 353, 358, 138 Cal. Rptr. 586, 591 (1977), *rev'd*, 98 S. Ct. 1690 (1978).

319. 98 S. Ct. at 1695.

320. Kulko v. Superior Court, 133 Cal. Rptr. 627 (1976), *aff'd*, 19 Cal. 3d 514, 564 P.2d 353, 138 Cal. Rptr. 586 (1977), *rev'd*, 98 S. Ct. 1690 (1978). Kulko did not contest the court's jurisdiction over the determination of custody, but only over the claim for increased support. *Id.*

321. CAL. CIV. PROC. CODE § 410.10 (West 1973).

322. *See, e.g.*, McGee v. International Life Ins. Co., 355 U.S. 220 (1957); Quattrone v.

to reside in California, Kulko had caused the effect of a direct financial burden on Horn for increased support costs. It held that he should therefore be amenable to suit in the state.[323]

The California Supreme Court affirmed,[324] but drew a distinction between Kulko's affirmative involvement in his daughter's move to California and his passive acquiescence in his son's change of residence. In the view of the California Supreme Court, by sending his daughter to California, Kulko purposefully availed himself of the benefits and protections of California's laws and derived an economic benefit from his acts since he was no longer primarily responsible for the child's welfare.[325] Having thus "caused an effect" in the state, Kulko was subject to California's jurisdiction for increased support payments for both children.[326] The court, though noting the important policy considerations implicit in assertions of jurisdiction over non-resident parents of children domiciled in the state, considered it reasonable to exercise jurisdiction over Kulko.[327]

Superior Court, 44 Cal. App. 3d 296, 303, 118 Cal. Rptr. 548, 554 (1975) (conspiratorial conduct out of state resulting in stock issuance).

323. Kulko v. Superior Court, 133 Cal. Rptr. 627, 628 (1976), *aff'd*, 19 Cal. 3d 514, 564 P.2d 353, 138 Cal. Rptr. 586 (1977), *rev'd*, 98 S. Ct. 1690 (1978). The appellate court noted that Kulko had offered in a letter to renegotiate the support agreement "in as much as it is invalidated." *Id.*

324. Kulko v. Superior Court, 19 Cal. 3d 514, 564 P.2d 353, 138 Cal. Rptr. 586 (1977), *rev'd*, 98 S. Ct. 1690 (1978).

325. *Id.* at 522-25, 564 P.2d at 356-58, 138 Cal. Rptr. at 589-91.

326. *Id.* at 521, 564 P.2d at 356, 138 Cal. Rptr. at 589.

327. *Id.* at 522-24, 564 P.2d at 356-58, 138 Cal. Rptr. at 589-91. The California court discussed two lower court opinions in which strong public policies were noted. In Titus v. Superior Court, 23 Cal. App. 3d 792, 100 Cal. Rptr. 477 (1972), a father domiciled in Massachusetts sent his children to visit their mother in California for the summer, pursuant to a written custody agreement. The court pointed out that permitting California to assume jurisdiction over the non-resident father on the basis of his acts of sending the children to that state for visits would discourage fathers from entering into and observing visitation agreements. The strong policy of encouraging visitation of children with their parents would thus be thwarted. *Id.* at 803, 100 Cal. Rptr. at 485. Similarly, in Judd v. Superior Court, 60 Cal. App. 3d 38, 131 Cal. Rptr. 246 (1976), a non-resident father who visited his children in California, where they lived with their mother, and who sent the mother spousal and child support, was able to quash service since he had never had custody of the children nor had he sent them to California. The policy enunciated in *Judd* was to encourage the payment of support and communication between a father and his children. *Id.* at 45, 131 Cal. Rptr. at 249.

The California Supreme Court's willingness to affirm the assertion of jurisdiction over Kulko is somewhat inconsistent with its issuance of a peremptory writ of mandate a year earlier in Sibley v. Superior Court, 16 Cal. 3d 442, 546 P.2d 322, 128 Cal. Rptr. 34 (1976). In *Sibley*, jurisdiction over a non-resident guarantor of an obligation executed, delivered and payable in California was held unjustified because the guarantor's relationship to California and the effects thereby caused in California were adjudged insufficient to confer jurisdiction upon California courts. *Id.* at 448-49, 546 P.2d at 326, 128 Cal. Rptr. at 38.

The United States Supreme Court reviewed the factual basis of California's assertion of jurisdiction and found that the "mere act of sending a child to California to live with her mother is not a commercial act and connotes no intent to obtain nor expectancy of receiving a corresponding benefit in the State that would make fair the assertion of that State's judicial jurisdiction."[328] The fact that Horn could have petitioned in California to increase Kulko's support obligation through the Uniform Reciprocal Enforcement of Support Act of 1968[329] weighed heavily in the Court's opinion.[330] The Act provides that such petitions may be adjudicated on their merits in the alleged obligor's forum, so that neither party need leave his or her own state. The Act also provides for enforcement of support decrees. Horn's argument that California had a substantial interest in protecting the welfare of children within its borders was thus undercut by the Court's reliance on the Act. The Court viewed California's participation in the Act as ensuring that the state's interest in the welfare and continued support of resident children was met.[331]

The Court criticized the California Supreme Court's reliance on the "effects" test,[332] which the United States Supreme Court viewed as being applicable to wrongful activity conducted outside of a state, causing injury within the state, or commercial activity affecting state residents.[333] Since Kulko's act of buying his daughter a one-way plane ticket to California could not be analogized to either of those activities, the Court found it unreasonable to force him to litigate in California.[334] The Court rejected the California court's holding that by sending his daughter to California, Kulko had purposefully availed himself of the

328. 98 S. Ct. at 1702. The parties had agreed that the controlling standard for the constitutionality of the assertion of jurisdiction was the "minimum contacts" inquiry established in *International Shoe*. *See generally* notes 308-09 and accompanying text *supra*.

329. 9 UNIFORM LAWS ANN. 473 (West Supp. 1977); CAL. CIV. PROC. CODE §§ 1650-1699 (West 1972 & Supp. 1977).

330. 98 S. Ct. at 1700.

331. *Id.* It should be noted, however, that the Act permits the alleged obligor to contest the claim. In such situations, the obligee may submit deposition testimony through the initiating court. CAL. CIV. PROC. CODE § 1683 (West 1972). While the Act may facilitate procurement of child support decrees which are uncontested, it is at least questionable whether the deposition procedure adequately protects the interests of the non-forum party.

332. 98 S. Ct. at 1699. California's "effects" test, *see* note 322 and accompanying text *supra*, is derived from A. L. I. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 (1971): "A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable."

333. 98 S. Ct. at 1695.

334. *Id.* at 1698-99.

benefits and protections of its laws.[335] Justice Marshall stated, "A father who agrees, in the interests of family harmony and his children's preferences, to allow them to spend more time in California than was required under a separation agreement can hardly be said to have 'purposefully availed himself' of the 'benefits and protection' of California's laws."[336] The Court also found, contrary to the California court, that Kulko did not derive any economic benefit from his daughter's presence in California, since any benefit resulted not from her presence in the forum state but rather from her absence from his home.[337] Based on these considerations, the Court held that California was not a proper forum for the action. Justice Brennan wrote a brief dissent in which he agreed with the California Supreme Court's weighing of the facts, though he noted that the issue was "close."[338]

The *Kulko* decision does not effect any substantial change in jurisdictional bases, as did *Shaffer*. Rather, the case indicates that where a state attempts to assert personal jurisdiction over a non-resident individual, rather than a commercial entity, fairness to the defendant dictates that some purposeful act, by which the defendant avails himself of the state's benefits and protections, be clearly shown. The number of "affiliating circumstances"[339] necessary to establish jurisdiction depends upon the facts of each case. *Kulko*, a narrow, factually-based decision, does little to clarify the "gray area" of reasonable assertions of *in personam* jurisdiction.

V. Substantive Due Process

A. Limiting Liability for Damages in Nuclear Accidents

The Supreme Court has repeatedly indicated its reluctance to invalidate legislation on substantive due process grounds.[340] Its distaste for substituting a judicial judgment for that of a legislative body is

335. *Id.* *See* note 325 and accompanying text *supra*.

336. 98 S. Ct. at 1698.

337. *Id.* at 1697.

338. *Id.* at 1702 (Brennan, J., joined by White & Powell, JJ., dissenting).

339. Hanson v. Denckla, 357 U.S. 235, 246 (1958).

340. "Substantive due process" refers to limits on the substance of legislation, rather than on the procedures employed, or, what the government may do rather than how it may do it. As stated in Ferguson v. Skrupa, 372 U.S. 726 (1963), the Court often refuses "to sit as a 'superlegislature to weigh the wisdom of legislation,' and . . . emphatically refuse[s] to go back to the time when courts used the Due Process Clause 'to strike down state laws . . . because they may be unwise, improvident, or out of harmony with a particular school of thought.'" *Id.* at 731-32 (quoting Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952) and Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955) (footnotes omitted)).

based on the doctrine of separation of powers.[341] In view of the continued vitality of this principle and the Court's expressed reluctance to infringe on legislative prerogatives,[342] it would seem futile to base an action on the perceived lack of wisdom or judgment embodied in a statute. Yet, in some cases, a substantive due process challenge may be the only avenue for redress of a legitimate injury.

In *Duke Power Co. v. Carolina Environmental Study Group, Inc.*,[343] the Price–Anderson Act's[344] ceiling on damages recoverable in the event of a nuclear accident was attacked on due process grounds. The action was instituted after previous attempts to block the construction and operation of nuclear power plants in North and South Carolina had failed.[345] Plaintiffs, most of whom lived and owned property near the nuclear plant sites,[346] claimed that the Act violated the Fifth Amendment because by both creating the source of the underlying injury and limiting the recovery therefor, the Act constituted arbitrary governmental action adversely affecting their property rights. Plaintiffs also claimed that in the event of a nuclear accident, their property would be "taken" without any assurance of just compensation.[347]

The stated purpose of the Act is to protect the public and to encourage the development of the atomic energy industry.[348] Passed in 1957,[349] the Act requires the private nuclear industry to purchase the maximum available amount of liability insurance, then $60 million.[350]

341. For a discussion of limits on judicial power, see Lochner v. New York, 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting); *id.* at 68, 72-73 (Harlan, J., joined by White & Day, JJ., dissenting).

342. *See* Whalen v. Roe, 429 U.S. 589, 597 (1977).

343. 98 S. Ct. 2620 (1978).

344. 42 U.S.C. § 2210 (1976).

345. *See* Carolina Environmental Study Group, Inc. v. United States Atomic Energy Comm'n, 431 F. Supp. 203, 205 (W.D.N.C. 1977) [hereinafter cited as Carolina Envir. Case], *rev'd sub nom.* Duke Power Co. v. Carolina Environmental Study Group, Inc., 98 S. Ct. 2620 (1978) [hereinafter cited as Duke Power Case]. The district court noted that plaintiffs had fought against nuclear power at numerous administrative and legal levels. *Id.* The construction permits had been unsuccessfully challenged in Carolina Environmental Study Group v. United States, 510 F.2d 796 (D.C. Cir. 1975).

346. Carolina Envir. Case, *supra* note 345, at 205.

347. Duke Power Case, *supra* note 345, at 2628.

348. 42 U.S.C. § 2012(i) (1976). The Act was designed to implement a governmental policy of encouraging development by the private sector of atomic energy for peaceful uses. Though both private industry and the Atomic Energy Commission were confident that no major nuclear disaster was likely to occur, the unique nature of nuclear power and the potential magnitude of an accident deterred private development. *See* Duke Power Case, *supra* note 345, at 2626.

349. Price-Anderson Act, Pub. L. No. 85-256, 71 Stat. 576 (1957).

350. 42 U.S.C. § 2210(c) (1976). Since 1957, the available amount of private insurance coverage has risen to $140 million, but the liability ceiling remains at $560 million. *See* note

If damages from a nuclear incident exceed private insurance coverage, the federal government will indemnify the licensee and other "persons indemnified" in an amount up to $500 million.[351] Subsequent amendments: (1) require all indemnified entities to waive any legal defenses in the event of a nuclear accident,[352] resulting in the equivalent of strict liability; (2) institute a deferred premium provision by requiring all reactor owners to contribute between two and five million dollars toward compensation for victims in the event of a nuclear accident;[353] and (3) explicitly provide that Congress will take appropriate and necessary action to protect the public in the event of an incident in which aggregate damages total more than $560 million.[354]

The district court issued a memorandum opinion which explored the ramifications of nuclear plant operation,[355] the likelihood of accidents,[356] and the effect of such plants on the environment.[357] It concluded that a real possibility existed of a nuclear catastrophe causing

352 *infra*. One claimed effect of the Act is the inability of homeowners to purchase nuclear catastrophe insurance because the entire insurance capacity has been absorbed by industry. *See* Duke Power Case, *supra* note 345, at 2627 n.9.

351. 42 U.S.C. § 2210(c) (1976). "Persons indemnified" refers to the person with whom an indemnity agreement is executed and any other person who may be liable for public liability. 42 U.S.C. § 2014(t) (1976).

352. Atomic Energy Amendments of 1966, Pub. L. No. 89-645, § 3, 80 Stat. 891 (codified at 42 U.S.C. § 2210(n)(1) (1976)). This 1966 amendment responded to Congress' perception of the unsettled nature of state tort law regarding nuclear accidents and the need for a common standard of liability. The waiver approach was considered preferable to prescribing strict liability by federal statute. The 1966 amendments also provided for transfer of all claims arising out of a single nuclear accident to one federal district court. In the event of liability in excess of the prescribed limits, the court is empowered to authorize immediate payment of 15% of the liability limitation to injured parties and to approve a plan of distribution to insure equitable treatment of all parties. *Id.* (amending 42 U.S.C. § 2210(n)(2), (o) (1976)).

353. Atomic Energy Amendments of 1975, Pub. L. No. 94-197, § 3, 89 Stat. 1111 (codified at 42 U.S.C. § 2210(b) (1976)). This provision effected a reduction in the federal government's contribution to the liability pool. At present, a nuclear incident would result in contributions totaling $315 million from the 63 existing nuclear plants, $140 million from private insurance and $105 million in federal government indemnity. As the number of plants increases, the liability ceiling will ultimately increase. *See* Duke Power Case, *supra* note 345, at 2627 & n.8.

354. Atomic Energy Amendments of 1975, Pub. L. No. 94-197, § 6, 89 Stat. 1111 (codified at 42 U.S.C. § 2210(e) (1976)).

355. Carolina Envir. Case, *supra* note 345, at 206-08.

356. *Id.* at 210-14. The court reviewed findings of the United States Nuclear Regulatory Commission published in October, 1975, comparing the Commission's estimates of the probability of nuclear accidents to those of the United States Environmental Protection Agency and expert critics of the Commission's study. The court found that the study seriously underestimated the likelihood of a "core melt," i.e., unchecked heat melting through the steel walls of a reactor. Though a core melt does not result in nuclear explosion, because the fuel of nuclear reactors does not contain a high enough proportion of Uranium-235, it

damage well in excess of the Price-Anderson limits.[358] The court also noted that without the protection of the Act, private corporations would be unwilling to undertake the development of nuclear power plants and would also be unable to obtain sufficient financing, supplies and architectural skills to build and maintain such plants.[359] After deciding the issues of standing[360] and ripeness[361] in plaintiffs' favor, the court declared that the Price–Anderson Act violated the due process and equal protection clauses of the Fifth Amendment.[362]

The district court appeared to apply a more elevated level of scrutiny to the constitutionality of the Act's provisions than is commonly employed in due process analyses. Despite the speculative nature of damages in the event of a future nuclear accident, the court found that the amount of recovery was not rationally related to the potential losses.[363] In addition, it viewed other protections provided by the Act,

would release large quantities of nuclear contaminants into the air and water. Concerning the United States Nuclear Regulatory Commission findings, see *Postscript, infra.*

357. *Id.* at 209-10. The court examined the immediate and potential effects on the environment. These included the immediate effects of releasing small quantities of radiation into the air and water near nuclear plants, increasing the temperature of nearby lakes resulting in changed ecology, producing objectively reasonable fear in individuals situated nearby, and other effects on the specific locales in question. The potential effects primarily concerned the possibility of a core melt or some other major accident.

358. *Id.* at 214-15.

359. *Id.* at 215-18. The court examined testimony before the 1956-1957 hearings of the Joint Committee on Atomic Energy and before the renewal hearings in September 1975. Corporate managers strongly indicated that the Act was necessary to induce their companies to enter the nuclear energy field. The court concluded that "but for" the Act, the nuclear plants would not be built or operated. *Id.*

360. *Id.* at 218-21. Standing requires that plaintiffs allege "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues." Baker v. Carr, 369 U.S. 186, 204 (1962)). The district court found that the "but for" nexus between the Act and nuclear plant construction, combined with the immediate and potential effects, the large number of persons likely to be injured, and the proximity of the plaintiffs to the reactor site, conferred the requisite standing. 431 F. Supp. at 218-21.

361. 431 F. Supp. at 221-22. The court noted that under North Carolina law, a right of action arises as soon as a wrongful act has created any injury, however slight, to the plaintiff. It found that the immediate effects of the plants, *see* note 357 *supra*, met this standard. Additionally, the court viewed the Supreme Court's holding in Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974), as analogous, rendering a prospective "taking" by virtue of an uncompensable nuclear accident ripe for adjudication. In *Regional Rail*, plaintiffs who owned interest in the Penn Central Railroad attacked the constitutionality of a law which authorized eight railroads to continue operating under Section 77 of the Bankruptcy Act. They asserted that the compulsory operation of the railroads would erode their equity, effecting a taking of property without assurance of just compensation. *Id.* at 124-25.

362. 431 F. Supp. at 222.

363. *Id.*

such as certain recovery,[364] prompt release of funds,[365] extension of statutes of limitation,[366] and the elimination of defenses,[367] as illusory benefits insufficient to justify limitations on recovery.[368] The court also found that policy considerations weighed against the constitutionality of the Act, in that it might tend to encourage "irresponsibility in matters of safety and environmental protection."[369] The due process violation was supplemented by a finding that the Act violated equal protection by providing a benefit to all of society, but arbitrarily placing the burden of potential injury only on persons who live near nuclear power plants.[370]

The Supreme Court reversed the district court, expressly deferring to the congressional judgment embodied in the Act.[371] Chief Justice Burger, writing for the majority, examined the threshold questions of subject matter jurisdiction in the district court,[372] standing and ripeness. The complaint alleged jurisdiction under 28 U.S.C. § 1337, which provides for federal jurisdiction over any civil action "arising under any Act of Congress regulating commerce or protecting trade."[373]

364. *Id.* at 224. The court reasoned that by virtue of the Act's ceiling on liability, any recovery would be in proportion to the total fund available to compensate injured persons and their property. The amount of any recovery was thus uncertain. In this respect, the Act differs from other laws limiting damages by formula, such as workmen's compensation statutes.

365. *Id.* The Act provides for immediate settlements totalling up to 15% of the total fund; thereafter, claims must be referred to a nearby district judge who determines proportionate settlements and approves a plan of distribution. 42 U.S.C. § 2210(n)(2), (o) (1976). Because some radiation injuries are not manifested for years, and because the district judge must provide for late-developing claims, the court saw a possibility that the settlement of claims could be a prolonged and uncertain process.

366. 431 F. Supp. at 224. The court noted that many statutes of limitation already provide for late discovery of injury by tolling rights of action until that time.

367. *Id.* at 223-24. Pursuant to an opinion expressed in PROSSER, THE LAW OF TORTS 516 (4th ed. 1971), that the principle of strict liability would certainly be applied in cases of injury from nuclear incident, the court viewed waiver of defenses as giving up "nothing of substantial value." 431 F. Supp. at 224.

368. *See* 431 F. Supp. at 223-24.

369. *Id.* at 222-23.

370. *Id.* at 224-25. The court noted that alternatives to liability limitation exist which would be rationally related to the interests asserted: 1) establishment of a liability pool funded by either advance contributions from nuclear power companies or liability for assessment on a unit basis, or 2) payment of damages out of the federal treasury.

371. Duke Power Case, *supra* note 345, at 2636. Three members of the Court, Justices Stewart, Rehnquist and Stevens, would not have reached the merits of the case, but concurred in the Court's judgment. *Id.* at 2641-42.

372. *Id.* at 2628. The district court had not considered this issue, and it had not been raised by the parties. The Court noted, however, that it could, under Liberty Mutual Ins. Co. v. Wetzel, 424 U.S. 737 (1976), address the question on its own motion. *Id.* at 740.

373. 28 U.S.C. § 1337 (1976).

The appellees' claims were found not to "arise under" the Price–Anderson Act because their right to relief did not depend upon the construction of the Act.[374] Section 1337 was therefore an improper jurisdictional base. However, the majority viewed the allegations of the complaint as stating a cause of action arising under the Constitution against the Nuclear Regulatory Commission, which was charged with enforcement and administration of the Act.[375] Jurisdiction could then be derived from 28 U.S.C. § 1331,[376] the general federal question statute, even though the Commission was not a named defendant. Since the facts alleged were sufficient to support jurisdiction under section 1331, this pleading defect was held not fatal.[377]

Justice Rehnquist took issue with the majority's disposition of the subject matter jurisdiction question. In his view, jurisdiction was improper under either section 1337 or section 1331[378] since the underlying claim arose out of state tort law and the Price–Anderson Act did not purport to grant any personal rights which could be vindicated in a federal court.[379] In fact, the Act was merely an anticipated defense to be invoked by Duke Power against a state cause of action.[380] As such, it was an improper basis for jurisdiction under the rule of *Louisville & Nashville Railroad v. Mottley*.[381] Furthermore, the complaint alleged no actual controversy against the Commission since the agency had no connection with the challenged limitation of liability; it had only

374. 98 S. Ct. at 2628-29. *See* Smith v. Kansas City Title & Trust, 255 U.S. 180, 199 (1921).

375. 98 S. Ct. at 2628-29. The complaint alleged that "[s]ince the Price-Anderson Act provides victims of a nuclear disaster no benefit while at the same time limiting their right to recover for their losses to approximately 2-1/2 percent of such losses, the operation of the $500 million limitation would, in the event of a nuclear disaster, deprive the persons injured by such a disaster of property rights without due process of law in violation of the Fifth Amendment to the Constitution of the United States." *Id.* at 2628 n.12.

376. 28 U.S.C. § 1331(a) (1976).

377. 98 S. Ct. at 2629 n.14.

378. *Id.* at 2643-44 (Rehnquist, J., joined by Stevens, J., concurring). Justice Rehnquist noted that the Court has construed the "arising under" language of §§ 1331 and 1337 similarly (citing Peyton v. Railway Express Agency, Inc., 316 U.S. 350, 353 (1942)).

379. *Id.*

380. *Id.* at 2643. If plaintiffs sued Duke Power for damages, their right of action would fall under North Carolina tort law. The company could assert the Act as a defense, and the Act's constitutionality would then be at issue. This chain of events would not confer federal jurisdiction under the rule that the basis for federal jurisdiction must appear on the face of a well-pleaded complaint. *See* note 381 and accompanying text *infra*.

381. 211 U.S. 149 (1908). In *Mottley*, plaintiffs sought to enforce performance of a contract in which the railroad had promised them free passes for life. An act of Congress forbade free passes. Because the act was merely a defense which the railroad could assert, plaintiffs could not predicate federal jurisdiction on the alleged unconstitutionality of the act.

granted a construction permit to Duke Power and agreed to indemnify the company.[382] Justice Rehnquist evinced concern over the abrogation of the "well-pleaded complaint" doctrine and would have remanded the case to the district court with instructions to dismiss for want of jurisdiction.[383]

Turning to the issue of standing, Chief Justice Burger concluded that since the district court's findings demonstrated a "distinct and palpable injury" to the plaintiffs[384] and a "fairly traceable" causal connection between the injury and the challenged conduct,[385] the standing requirements were met.[386] The first prong of the standing inquiry was satisfied by the immediate adverse effects on the environment, set out in the district court opinion.[387] The second prong was fulfilled by the "but for" connection between the Act and construction of nuclear plants found by the district court.[388] The Court did not require that a connection be established between the claimed injuries and the constitutional rights being asserted. The majority was thus willing to apply a less rigorous nexus requirement than has been demanded in taxpayer suits such as *Flast v. Cohen*.[389] Justice Stewart disagreed that a relationship had been established between the immediate effects of the nuclear plants and the law limiting liability for future nuclear incidents. An "interest in the local water temperature" did not, in his opinion, confer standing.[390] In resolving the final preliminary issue, the majority followed the district court's reasoning, deciding that the issue was ripe for adjudication. It found that, as in the *Regional Rail Reorganization Act Cases*,[391] the Court would be in no better position later to re-

382. 98 S. Ct. at 2644-45. In Justice Rehnquist's opinion, "The only federal action challenged by this complaint is a hypothetical district court's hypothetical invocation of the statute in the event of a hypothetical nuclear accident." *Id.* at 2644 n.3.

383. *Id.* at 2644 & n.2. *See* note 378 and accompanying text *supra.*

384. *See* Warth v. Seldin, 422 U.S. 490, 501 (1974).

385. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 261 (1977).

386. 98 S. Ct. at 2630.

387. *Id.* at 2630-31. *See* note 356 *supra.*

388. 98 S. Ct. at 2631-33.

389. 392 U.S. 83 (1968). *Flast* required taxpayers to establish a link between their status as taxpayers and 1) the type of legislative enactment being attacked, and 2) the precise nature of the constitutional infringement alleged. *Id.* at 102.

The two-level nexus requirement only applies to taxpayer suits. *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 225 n.15 (1974).

390. 98 S. Ct. at 2642 (Stewart, J., concurring). Justice Stewart believed that no relationship had been demonstrated between the immediate environmental effects alleged and the challenge to liability limitation, other than the fact that a successful attack would put Duke Power out of the nuclear power business.

391. 419 U.S. 102 (1974).

solve the claims presented.[392]

Having decided the threshold issues, the Court rejected appellees' argument that the constitutionality of the Act merited a more elevated standard of review than would a challenged economic regulation.[393] Since Congress' purpose in enacting the measure was to remove economic impediments to the development of nuclear power, in the Court's view the Act fell squarely into the category of economic regulations. As such, it was endowed with a presumption of constitutionality which could be rebutted only by demonstrating that Congress acted in an arbitrary or irrational manner.[394] The difficulty of satisfying this requirement presaged the Court's holding.

The Court agreed with the district court that Congress intended to stimulate the private development of nuclear power and that the Act was a rational means of achieving that purpose.[395] Chief Justice Burger pointed out that appellees challenged only the alleged arbitrariness of the liability ceiling.[396] Given the impossibility of foreseeing the extent of damage resulting from a nuclear accident and Congress' evident intention of enacting extraordinary relief measures in the event that damages exceeded the ceiling,[397] the Court found the limitation to be

392. 98 S. Ct. at 2635. *See* note 361 *supra*.

393. *Id.* at 2636. The appellees had urged the Court to apply an intermediate standard such as that utilized in Craig v. Boren, 429 U.S. 190 (1976). *Craig*, a gender-based equal protection challenge to a statute prohibiting sale of 3.2% beer to males under 21 and females under 18, struck down the statute because the state did not demonstrate that classification by sex was "substantially related" to achievement of an "important governmental objective." *Id.* at 197.

394. 98 S. Ct. at 2636 (citing Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976)). By focusing on the economic purpose of the Act, the Court avoided articulating a due process standard of review applicable to legislation with important social consequences. Economic legislation must satisfy only a "relatively relaxed standard of reasonableness," City of Charlotte v. Local 660, 426 U.S. 283, 286 (1976), and the burden of demonstrating the irrationality of economic legislation rests on the party claiming the due process violation. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976). This minimal standard reflects the continuing flight from substantive due process as applied in Lochner v. New York, 198 U.S. 45 (1905). *See* notes 340-41 and accompanying text *supra*. Even if the challenged legislation were not characterized as "economic," it is by no means clear that the Court would raise its level of scrutiny without the presence of a "fundamental interest" or "suspect class." *See, e.g.*, Whalen v. Roe, 429 U.S. 589, 597 (1977) (state law impinging on right to privacy held constitutional even though it was found unnecessary). *But see* United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) (state repeal of an economic covenant was neither necessary to implement a mass transit plan nor reasonable. The *United States Trust* decision is an anomaly, reviving to a limited extent the *Lochner* prohibition against impairment of contracts.

395. 98 S. Ct. at 2636.

396. *Id.*

397. 42 U.S.C. § 2210(e) (1976) provides that Congress "will take whatever action is deemed necessary and appropriate to protect the public from the consequences of a disaster

within "permissible limits" and so not violative of due process.[398] The majority's reliance upon the likelihood of emergency relief suggests that the Court would have found a ceiling even lower than $500 million to be permissible. No mention was made of the fact that the ceiling has remained virtually constant since 1957, despite inflation. The Court noted, however, that the probability of an accident is lower and the likely consequences are much less severe than previously thought, leading Congress to forgo raising the ceiling in 1975.[399] The district court's concern that the Act might tend to encourage irresponsibility on the part of builders and owners of nuclear plants was dismissed after summary consideration. The Court looked to the rigorous licensing requirements imposed by the Atomic Energy Commission as the principal safeguard.[400] In addition, it viewed a private utility's financial self-interest as assurance of responsible conduct.[401]

The remaining challenge to the Act concerned the abrogation of the common law rights of recovery of damages without provision of a satisfactory *quid pro quo*.[402] The Court examined the reasonableness of the Price-Anderson Act remedies, though noting obliquely that "it is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy."[403] Although appellees attempted to distinguish the Act from a host of statutes which constitutionally limit liability for other types of injuries[404] on the basis

[involving damages in excess of the ceiling]." The district court was considerably more wary of relying on congressional grace, stating, "Mr. Micawber would like that idea." Carolina Envir. Case. *supra* note 345, at 224.

398. 98 S. Ct. at 2637-38.

399. *Id.* at 2637 n.30. *See* S. REP. No. 454, 94th Cong., 1st Sess. 12, *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS 2251, 2262.

400. 98 S. Ct. at 2638. *See* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978).

401. 98 S. Ct. at 2638.

402. *Id.*

403. *Id.* In a footnote to this statement, the Court reiterated: "Our cases have clearly established that '[a] person has no property, no vested interest, in any rule of the common law.' Second Employer's Liability Cases, 223 U.S. 1, 50 . . . (1911) quoting Munn v. Illinois, 94 U.S. 113, 134 . . . [sic] (1876)." 98 S. Ct. at 2638 n.32.

404. *See, e.g.*, Crowell v. Benson, 285 U.S. 22 (1932) (sustained act of Congress providing for standard compensation for death or injury to employees arising out of maritime employment); Silver v. Silver, 280 U.S. 117 (1929) (upheld statute barring recovery for injuries sustained by guests in automobiles as a result of drivers' ordinary negligence); New York Cent. R.R. v. White, 243 U.S. 188 (1917) (New York workmen's compensation law holding employers absolutely liable but limiting damages did not violate due process); Second Employers' Liability Cases, 223 U.S. 1 (1912) (state tort laws held constitutionally superseded by the Federal Employers' Liability Act).

of its "but for" relationship to the claimed injuries, the Court saw no essential difference.[405]

Viewing the likelihood of injured parties collecting damages in excess of $560 million from a practical standpoint, the Court found several policy justifications for the Act. It assured at least a $560 million fund with which to compensate injured parties.[406] In contrast, testimony before the district court indicated that Duke Power, one of the nation's largest utility companies, would approach insolvency if required to satisfy damage claims in excess of $200 million.[407] The Court declined to speculate as to what other avenues for ensuring satisfaction of large damage claims might have been developed. Additionally, the Court regarded the mandatory waiver of defenses[408] as a substantial benefit to potential claimants.[409] Finally, since the Act provided for district court resolution of claims against the fund, the spectre of a "race to judgment" for recovery of a private entity's dwindling resources was laid to rest.[410]

The Court referred to its 1917 decision in *New York Central Railroad v. White*[411] as support for its holding that the Act provided a reasonable substitute for state tort remedies. *New York Central* was an employer's challenge to New York's workmen's compensation law in an effort to avoid liability for the death of an employee. The law, similar in some respects to the Price–Anderson Act, fixed employers' liability for the disability or death of employees in certain hazardous jobs according to a prescribed scale keyed to the employee's earning power, the nature of his injuries and the dependency of his beneficiaries. The duty to compensate employees was made absolute, so that injured workers were relieved of the burden of proving negligence; no affirmative defenses would obtain. The employer, though absolutely liable,

405. 98 S. Ct. at 2639 n.33. The Court pointed out that in order for the "but for" connection to mandate a *quid pro quo* inquiry, a due process right to be free of nuclear power must be demonstrated. No such right exists, however. The Court implicitly acknowledged that the suit was a tactical maneuver to stay the development of nuclear plants altogether, rather than an action to assure adequate compensation for damages.

406. *Id.* at 2640. The Court also noted the express statutory commitment to take whatever steps necessary to alleviate the consequences of a nuclear accident. *Id. See* 42 U.S.C. § 2210(e) (1976).

407. 98 S. Ct. at 2640 n.36.

408. 42 U.S.C. § 2210(n)(1) (1976). *See* note 352 and accompanying text *supra.*

409. 98 S. Ct. at 2640. The Court pointed out that the standard of liability applicable to a nuclear accident is unclear, and that even if strict liability were applied, there are exceptions for acts of God or of third parties. *Id.*

410. *Id.* at 2640-41. Other flaws in the Act discerned by the district court were also dismissed as unwarranted.

411. 243 U.S. 188 (1917).

was assured of not incurring damage liability in excess of a certain amount.[412] Although the New York provisons are similar to those of the Price–Anderson Act, the underlying policy justifications for each are quite different. The New York law was an effort to compensate for the complexity inherent in ascertaining the causes of industrial accidents, which often worked to the detriment of injured workers who were unable to embark on costly, prolonged litigation.[413] The Price–Anderson Act appears to be only secondarily concerned with safeguarding the rights of injured parties. Its primary *raison d'être* is to induce private industry to enter the nuclear power field. Where the substantive rights of individuals are pitted against the economic or administrative burdens of a corporate or public entity, the Court sometimes raises its level of scrutiny.[414] Despite its disclaimers in *Duke Power*, the Court's detailed assessment of the Act's provisions suggests that, in fact, an augmented standard of review was employed. In view of the importance of nuclear energy research and development, the Court might well have concluded that the Price–Anderson Act's liability ceiling served an "important governmental objective" and was "substantially related to the achievement of that objective."[415] Its explicit refusal to characterize its analysis as anything more than the most limited review may have been intended to discourage substantive due process claims of a less unique nature than were presented in *Duke Power*.

Justice Stevens, concurring in the judgment, remarked that the Court's opinion "will serve the national interest in removing doubts concerning the constitutionality of the . . . Act."[416] Nevertheless, he viewed the "advisory opinion" as inappropriate "statesmanship" rather than proper adjudication.[417]

Postscript

On January 19, 1979, the United States Nuclear Regulatory Com-

412. *Id.* at 192-93.

413. *Id.* at 197.

414. *See, e.g.*, United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) (modification of a state's obligation to bondholders held neither reasonable or necessary to serve state's mass transit plan). *See* note 394 *supra*. *See also* Moore v. City of East Cleveland, 431 U.S. 494 (1977) (ordinance restricting dwelling occupancy to narrowly-defined single families merited the Court's careful examination of the importance of the governmental interests advanced and the extent to which they were served by the regulation); *see also* Hurst, *Municipal Bonds and the Contract Clause: Looking Beyond United States Trust Company v. New Jersey*, 5 HASTINGS CONST. L.Q. 25, 59 (1978)).

415. Craig v. Boren, 429 U.S. 190, 197 (1976). *See* note 393 and accompanying text *supra*.

416. 98 S. Ct. at 2646 (Stevens, J., concurring).

417. *Id.*

mission issued a statement[418] qualifying its endorsement of the Nuclear Reactor Safety Study.[419] The Study's findings on the low probability of nuclear accident were extensively cited in the House report recommending renewal of and amendments to the Price-Anderson Act.[420] The Commission's statement criticized the Safety Study's peer review processes and the reliability of its quantitative estimates of the risks of nuclear accidents. In addition, the Commission withdrew any explicit or implicit past endorsement of the Study's Executive Summary of the voluminous report. The Commission found the Summary did not adequately portray the full extent of the consequences of reactor accidents and was a poor description of the contents of the report. One might query whether the Commission's second thoughts on the Safety Study would have made any difference to the Court's analysis in *Duke Power* and, further, whether the latest statement may influence Congress to raise the liability ceiling in the future.

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418. United States Nuclear Regulatory Commission Press Release (January 19, 1979).

419. United States Nuclear Regulatory Commission Reactor Safety Study, An Assessment of Accidents Risks in U.S. Commercial Nuclear Power Plants (WASH.-1400) (1975). *See* note 356 and accompanying text *supra.*

420. H.R. REP. No. 94-648, 94th Cong. 1st Sess. 15-16 (1975).

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Equal Protection

Introduction

The following discussion analyzes the most significant equal protection decisions handed down during the Supreme Court's October, 1977 Term. These decisions can be divided into two categories. The first relates to freedom of choice in matters of family life; the second involves the status of aliens.[1]

Califano v. Jobst,[2] *Quilloin v. Walcott*[3] and *Zablocki v. Redhail*[4] fur-

1. The long-awaited "reverse discrimination" decision, Regents of the University of California v. Bakke, 98 S. Ct. 2733 (1978), is not discussed below for two reasons. First, its actual holding is extremely narrow. The Court held that a state medical school's special admissions program, under which a certain number of places in the entering class were reserved exclusively for minority applicants, violated the prohibition against racial discrimination contained in Title VI of the Civil Rights Act of 1964. *Id.* at 2764 (opinion of Powell, J.), 2815 (Stevens, J., joined by Burger, C.J., and Stewart & Rehnquist, JJ.). Secondly, the extraordinary split within the Court and the multiplicity of separate opinions issued by the Justices in support of their various views renders the decision difficult to analyze in the necessarily abbreviated scope of this Review. The points upon which two different five-Justice majorities of the Court agreed are: 1) that racial and ethnic classifications of any sort are inherently suspect and thus subject to the most exacting judicial scrutiny; and 2) that an individual's race may be taken into account to ensure racial diversity in governmental programs, even absent a finding of past racial discrimination. The thrust of the Court's decision is that state admissions programs may make race a competitive consideration, but they must not rigidly foreclose the evaluation of applicants not within the favored racial or ethnic groups. For a discussion of *Bakke* and its implications, see Schwartz, *Foreword—The Supreme Court, October 1977 Term*, 6 HASTINGS CONST. L.Q. 1, 3-6 (1979).

Only two other decisions handed down last term which had an impact on equal protection clause analysis are not discussed below. Baldwin v. Fish and Game Commission of Montana, 436 U.S. 371 (1978), dealt only tangentially with the equal protection clause. *Baldwin*'s primary focus was on the question of whether a Montana elk-hunting statute which imposed substantially higher (seven and one-half times) license fees on nonresidents than on state residents denied nonresidents their rights under the privileges and immunities clause of the federal Constitution. The Court found that the right to engage in recreational activity was not "fundamental" and therefore not protected under the privileges and immunities clause. *Id.* at 388. As a corollary to the Court's central holding, the distinction between residents and nonresidents was held permissible under the equal protection clause as a rational exercise of the police power to protect wildlife when used to allocate access to recreational hunting. *Id.* at 390.

Carter v. Miller, 434 U.S. 356 (1978), affirmed per curiam by an equally divided Court without opinion a decision of the Court of Appeals for the Seventh Circuit, 547 F.2d 1314 (1977), which held that a city ordinance absolutely barring an individual convicted of certain offenses from obtaining a chauffeur's license, while permitting one who already held such a license but who was similarly convicted to retain it, violated the equal protection clause. The Court of Appeals found such distinctions among the class of ex-offenders irrational.

2. 434 U.S. 47 (1977).
3. 434 U.S. 246 (1978).
4. 434 U.S. 374 (1978).

ther refine the extent to which the Constitution will be construed to protect individual autonomy in making important personal decisions in various contexts. The opinions reflect little significant change in the developing trends of equal protection analysis in this area of privacy and fundamental rights. If any generalization can be made, it is that the Court is apparently becoming more willing to protect a person's right to marry against excessive governmental interference, and will elevate the interests of persons within a legally sanctioned marriage over the interests of those who are not part of such a traditional family unit. The Court remains reluctant, however, to interfere with complex schemes of federal social welfare legislation, even when the provisions of such statutes may not affect all recipients evenhandedly.

Foley v. Connelie[5] is a significant opinion defining the constitutional protection afforded aliens lawfully residing in this country as permanent residents. The decision carves out a broad exception in the area of public employment to the right of aliens to obtain employment free from discrimination based on their status as noncitizens.

I. Freedom of Personal Choice in Matters of Family Life

Three decisions handed down during the October, 1977 Term concern governmental regulations having the potential for undue interference with an individual's constitutionally protected right of personal choice in matters of family life.[1] Two of the three, *Califano v. Jobst*[2] and *Zablocki v. Redhail*,[3] were sharply distinguished on their facts and so must be considered together if a consistent pattern of equal protection analysis can be developed from this term's opinions. It should also

5. 435 U.S. 291 (1978).

* * *

1. Zablocki v. Redhail, 434 U.S. 374 (1978); Quilloin v. Walcott, 434 U.S. 246 (1978); Califano v. Jobst, 434 U.S. 47 (1977).

The constitutional right of familial privacy has been developed in a line of cases commencing with Griswold v. Connecticut, 381 U.S. 479 (1965), which held that a statutory prohibition against the use of contraceptives by married persons was an impermissible intrusion into the marital relationship, one of the constitutionally protected "zones of privacy." *Id.* at 484. Subsequent cases have expanded this right in order to protect: the use of contraceptives by single persons, Eisenstadt v. Baird, 405 U.S. 438 (1972); a woman's decision whether or not to terminate her pregnancy, Roe v. Wade, 410 U.S. 113 (1973); a woman's ability to obtain an abortion free of burdensome procedures, Doe v. Bolton, 410 U.S. 179 (1973), Planned Parenthood v. Danforth, 428 U.S. 52 (1976); a woman's decision to bear her child, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 640 (1974); the commercial distribution of nonmedical contraceptives, Carey v. Population Serv. Int'l, 431 U.S. 678 (1977); and, generally, "the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing," Paris Adult Theatre I v. Slaton, 413 U.S. 49, 65 (1973). This right has been characterized as "the interest in making certain kinds of important decisions." Whalen v. Roe, 429 U.S. 589, 599-600 (1977) (footnote omitted). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 921-34 (1978).

2. 434 U.S. 47 (1977).

3. 434 U.S. 374 (1978).

be noted that, although *Jobst*, *Zablocki* and *Quilloin v. Walcott*[4] are nominally equal protection decisions, much of their doctrinal support is taken from due process considerations.

A. Social Insurance Legislation

Califano v. Jobst[5] is remarkable in that it is a unanimous decision by the Supreme Court, a rarity in the recent climate of equal protection analysis. Authored by Justice Stevens, *Jobst* adds further weight to the line of cases that have applied the rational basis standard of review to challenges to social welfare legislation.[6]

John Jobst, disabled since birth by cerebral palsy, qualified for and received child's insurance benefits as a disabled dependent under the Social Security Act.[7] Although the woman he subsequently married was also disabled, she was not entitled to benefits under the Act and Jobst's child's insurance benefits were therefore terminated.[8] He

4. 434 U.S. 246 (1978).

5. 434 U.S. 47 (1977), *rev'g* Jobst v. Richardson, 368 F. Supp. 909 (W.D. Mo. 1974).

6. *See* Mathews v. De Castro, 429 U.S. 181 (1976); Mathews v. Lucas, 427 U.S. 495 (1976); Weinberger v. Salfi, 422 U.S. 749 (1975); Geduldig v. Aiello, 417 U.S. 484 (1974); Richardson v. Belcher, 404 U.S. 78 (1971); Dandridge v. Williams, 397 U.S. 471 (1970); Fleming v. Nestor, 363 U.S. 603 (1960).

The Supreme Court has articulated this standard of review by stating, "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' " Dandridge v. Williams, 397 U.S. 471, 485 (1970) (quoting Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911)). Although *Jobst* concerns a federal statute—the Social Security Act—a classification that meetings the *Dandridge* test is consistent with the due process clause of the Fifth Amendment, the basis of the challenge in *Jobst*. Richardson v. Belcher, 404 U.S. 78, 81 (1971).

7. 42 U.S.C. § 402(d) (1976).

8. 42 U.S.C. § 402(d)(1)(D), (5) (1976). The statute provides:

> (d)(1) Every child (as defined in section 416(e) of this title) of an individual entitled to old-age or disability insurance benefits, or of an individual who dies a fully or currently insured individual, if such child—
>
> (A) has filed application for child's insurance benefits,
>
> (B) at the time such application was filed was unmarried and (i) either had not attained the age of 18 or was a full-time student and had not attained the age of 22, or (ii) is under a disability (as defined in section 423(d) of this title) which began before he attained the age of 22, and
>
> (C) was dependent upon such individual—
>
> . . . .
>
> shall be entitled to a child's insurance benefit for each month, beginning with the first month after August 1950 in which such child becomes so entitled to such insurance benefits and ending with the month preceding whichever of the following first occurs—
>
> (D) the month in which such child dies or marries,
>
> . . . .

brought suit alleging that the relevant provisions of the Social Security Act denied him equal protection of the laws in violation of the due process clause of the Fifth Amendment.[9] The denial of equal protection was claimed to arise from the statutory exemption from the termination of benefits granted to disabled child beneficiaries who marry persons also entitled to benefits under the Act.[10] The district court held the Social Security Act violative of principles of equal protection because of the different treatment of various classes of child's insurance beneficiaries who marry disabled persons.[11]

Jobst had urged application of the strict scrutiny standard of review, claiming that his constitutional right to marry the person of his choice was being infringed by the Act.[12] The lower court did not reach the strict scrutiny question, however, striking the statute down on the ground that even though there may be a rational basis for the distinc-

(5) In the case of a child who has attained the age of eighteen and who marries—

(A) an individual entitled to benefits under subection (a), (b), (e), (f), (g), or (h) of this section or under section 423(a) of this title, or

(B) another individual who has attained the age of eighteen and is entitled to benefits under this subsection, such child's entitlement to benefits under this subsection shall, notwithstanding the provisions of paragraph (1) of this subsection but subject to subsection (s) of this section, not be terminated by reason of such marriage . . . .

9. Because *Jobst* was a challenge to a federal statute, the due process clause of the Fifth Amendment rather than the due process or equal protection clause of the Fourteenth Amendment was implicated. It is well established, however, that equal protection principles are present in the due process clause of the Fifth Amendment. *E.g.*, Mathews v. De Castro, 429 U.S. 181, 182 n.1 (1976); Weinberger v. Salfi, 422 U.S. 749, 770 (1975); Flemming v. Nestor, 363 U.S. 603, 611 (1960); Bolling v. Sharpe, 347 U.S. 497, 499 (1954). The Social Security Act is therefore subject to equal protection scrutiny.

Last term in Mathews v. De Castro, 429 U.S. 181 (1976), the Court applied this test of constitutionality to the Act: "To be sure, the standard by which legislation such as this must be judged 'is not a toothless one'. . . . But the challenged statute is entitled to a strong presumption of constitutionality. 'So long as its judgments are rational, and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straitjacket.'" *Id.* at 185 (quoting Mathews v. Lucas, 427 U.S. 495, 510 (1976); Jefferson v. Hackney, 406 U.S. 535, 546 (1972)).

10. 42 U.S.C. § 402(d)(5) (1976), *quoted in* note 8 *supra*.

11. Jobst v. Richardson, 368 F. Supp. 909 (1974), *rev'd*, 434 U.S. 47 (1977).

12. *Id.* at 912. Plaintiff cited Loving v. Virginia, 388 U.S. 1, 12 (1969) and Meyer v. Nebraska, 262 U.S. 390, 399 (1923) in support of this claim. He attempted to invoke the rule that, "any classification which serves to penalize the exercise of [a constitutional] right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional." Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (emphasis in original). The district court noted that it had "serious doubt whether plaintiff's strict standard argument may be said to be tenable in light of Dandridge v. Williams, 397 U.S. 471 . . . and San Antonio Independent School District v. Rodriguez, 411 U.S. 1. . . ." Jobst v. Richardson, 368 F. Supp. at 912. The court did not reach this issue, *discussed in* the text accompanying note 13 *infra*, and the strict scrutiny argument was dropped before the Supreme Court.

tion drawn between those beneficiaries marrying benefit-collecting disabled persons and those beneficiaries marrying persons who are not disabled, the statute actually created another distinction which was arbitrary and unrelated to its purpose.[13] As applied, the statute created two different classes of beneficiaries, those who marry disabled persons who receive child's insurance benefits, and those who marry disabled persons who do not.[14] The court noted that the purpose of the statute was to provide continuing benefits to those beneficiaries who were disabled before their marriage because it was felt that their need would continue even after marriage if both husband and wife received child's insurance benefits.[15] Since the purpose was to alleviate hardship where disabled dependent persons marry one another, it was held to be irrational to terminate benefits where two persons who were in fact disabled, married.[16] The basis of the lower court's opinion was its interpretation of the legislative purpose of the statute. If the legislative intent was to be implemented, the triggering event for the collection of benefits after marriage should be a marriage to another disabled person, not the contingency that both disabled persons be child's insurance beneficiaries.[17] The lower court found no rational basis for the distinction between beneficiaries who marry disabled persons who receive benefits and beneficiaries who marry disabled persons who do not, and that the distinction had no relevance to the purpose for which the general classifications in the statute were drawn.[18] It therefore held that the statute violated principles of equal protection incorporated in the Fifth Amendment.

On direct appeal[19] the Supreme Court reversed, holding that Jobst was not deprived of property without due process of law by the marriage termination rule,[20] and that the favored treatment of marriages between secondary beneficiaries does not violate the principles of

13. 368 F. Supp. at 913.

14. *Id.* at 913.

15. *Id.* at 912-13.

16. *Id.* at 913. The court stated that, "legislation must be drawn so that the distinctions made have 'some relevance to the purpose for which the classification is made.' " *Id.* (quoting Baxstrom v. Herold, 383 U.S. 107, 111 (1966)).

17. 368 F. Supp. at 913.

18. *Id.* "We find and conclude that Congress did not draw [the statute] in a manner so that the result of the application of those provisions in this case is consistent with what may have been an effort to establish a rational classification."

19. The statute allowing direct appeal from decisions invalidating acts of Congress is 28 U.S.C. § 1252 (1976).

20. Califano v. Jobst, 434 U.S. at 54.

equality embodied in the due process clause of the Fifth Amendment.[21] The Court began its analysis with an examination of the broad structure and purpose of the Social Security Act. This analysis was divided into two parts, considering first the validity of a general requirement that benefits payable to a wage earner's dependent terminate upon marriage, and second, the propriety of an exception to the general requirement for marriages between persons who are both receiving benefits.

The Social Security Act was characterized as a "complex statutory scheme designed to administer a trust fund" financed by contributions of wage earners, the primary beneficiaries.[22] The Court found that the entitlement of a secondary beneficiary is based on his or her relationship to a contributing wage earner; consequently, eligibility for benefits is unrelated to actual need.[23] Since the purpose of the statute is to pro-

21. *Id.* at 58. Before the Court's decision on the merits, the case was remanded for reconsideration in light of a newly enacted statute, 42 U.S.C. §§ 1381, 1381a (1976), under which Jobst and his wife had become entitled to supplemental security income benefits. Weinberger v. Jobst, 419 U.S. 811 (1974). The district court concluded that the new program had no relevance to the case, however, and reinstated its original judgment. *See* 434 U.S. at 50.

22. *Id.* at 52.

23. *Id.* (citing Mathews v. De Castro, 429 U.S. 181, 185-86 (1976)). *De Castro* was a nearly unanimous decision: the opinion by Justice Stewart was joined by Chief Justice Burger and Justices Brennan, White, Blackmun, Powell, Rehnquist, and Stevens; Justice Marshall concurred without a separate opinion. *De Castro* held that a provision of the Social Security Act, 42 U.S.C. § 402(b)(1) (1976), which grants benefits to a married woman under 62 with dependent children in her care whose husband retires or becomes disabled, but which denies them to a divorced woman under 62 with dependents, is not violative of equal protection under the due process clause of the Fifth Amendment. The objective of the provision, like that at issue in *Jobst,* is to protect workers and their families from the hardships arising from the loss of earnings due to illness or old age, 429 U.S. at 185-86. The comparability of a divorced woman's need to that of a woman entitled to benefits was therefore "hardly in point." *Id.* at 187. Since "Congress could rationally have decided that the resultant loss of family income, the extra expense that often attends illness and old age, and the consequent disruption in the family's economic well-being that may occur when the husband stops working justify monthly payments to a wife who together with her husband must still care for a dependent child," *id.* at 187, and since "Congress could have rationally assumed that divorced husbands and wives depend less on each other for financial and other support than do couples who stay married," *id.* at 188, the classification excluding divorced women was upheld. The Court set forth a rational basis standard by which such legislation would be judged: "The basic principle that must govern an assessment of any constitutional challenge to a law providing for governmental payments of monetary benefits is well established. . . . 'The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment.' " *Id.* at 185 (citing Helvering v. Davis, 301 U.S. 619, 640 (1937)).

The near-unanimous opinion of *De Castro,* in which there was a clear discrimination between similarly situated beneficiaries distinguished only by their marital status, coupled with the unanimous opinion in Califano v. Jobst, indicate that the Court will be unwilling to

tect the wage earners and the dependent members of their families against "the hardship occasioned by [a] loss of earnings," the statute "is not simply a welfare program generally benefiting needy persons."[24] The district court's emphasis on Jobst's continuing need as a disabled dependent, due to his marrying another disabled person, was therefore rejected. Need was not the relevant distinguishing characteristic of child's insurance beneficiaries; the determining factor was probable dependency.[25] The focus of the analysis was thus shifted to the validity of the occurrence of marriage as the triggering event for the discontinuance of benefits.

The Court found the concept that marriage changes dependency expressed throughout the Social Security Act.[26] Congress had elected to use simple criteria, such as age and marital status, to determine probable dependency, and the Court held that it need not require individualized proof on a case-by-case basis.[27] Relying on *Weinberger v. Salfi*,[28] which upheld provisions of the Social Security Act denying

overturn social welfare legislation, particularly where statutory classifications under the Social Security Act are challenged.

24. Califano v. Jobst, 434 U.S. at 52 (citing Califano v. Goldfarb, 430 U.S. 199, 213-14 (1977) (plurality opinion)). *Goldfarb* held that the different treatment of men and women mandated by a Social Security Act provision that automatically provided benefits for widows regardless of dependency, but denied similar benefits to widowers not receiving at least half of their support from their wives, 42 U.S.C. § 403(f)(1)(D) (1976), constituted invidious discrimination against female wage earners by affording them less protection for their surviving spouses than is provided to male employees. The Court focused on the fact that eligibility for benefits hinged upon whether one was to some degree a dependent of the covered wage earner. The *Goldfarb* court focused on actual dependency, 430 U.S. at 212-13, in contrast with Mathews v. De Castro, 429 U.S. 181 (1976), *discussed in* note 23 *supra*. No "reasonable congressional judgment that nondependent widows should receive benefits because they are more likely to be needy than nondependent widowers" was found, 430 U.S. at 214, and the provision was invalidated.

25. 434 U.S. at 52 (citing Mathews v. De Castro, 429 U.S. 181, 185-86 (1976), *discussed in* note 23 *supra*).

26. 434 U.S. at 52-53 n.8.

27. *Id.* at 52-53 (citing Weinberger v. Salfi, 422 U.S. 749, 776 (1975)). It is interesting to note the Court's agreement with Mathews v. De Castro, *discussed in* note 23 *supra* (upholding a provision of the Act by a nearly unanimous court) in connection with its failure to cite Califano v. Goldfarb, *discussed in* note 24 *supra*, striking a provision of the Act down by a bare majority of a sharply divided court). In *Goldfarb*, Justice Stevens wrote a separate concurring opinion agreeing with several substantive points raised by the dissenting opinion of Justice Rehnquist. *See Constitutional Review: Supreme Court 1976-77 Term*, 5 HASTINGS CONST. L.Q. 74 (1978).

28. 422 U.S. 749 (1975). Authored by Justice Rehnquist and joined by Chief Justice Burger and Justices Stewart, White, Blackmun, and Powell, the opinion is highly deferential to legislative judgment. *Id.* at 768-77. In its vehement disapproval of the irrebutable presumption doctrine applied by the lower court in ruling a provision of the Social Security Act unconstitutional, the court stated: "We think that the District Court's extension of the holdings of *Stanley*, *Vlandis* and *LaFleur* to the eligibility requirement in issue here would turn

widows' benefits to all persons who had not been married at least nine months before the death of the primary beneficiary wage earner, the Court held that efficiency in the administration of a complex social welfare system such as Social Security requires such general rules.[29] The Court enunciated a very narrow category of cases in which a distinction would be held irrational: "Differences in race, religion, or political affiliation could not rationally justify a difference in eligibility for social security benefits. . . ."[30] A distinction between married and unmarried persons, on the other hand, is a relevant test of probable dependency, and the Court found the assumption that a married person is less likely to be dependent on his parents for support than an unmarried person unquestionably valid.[31] Thus, the general rule that benefits of secondary beneficiaries terminate upon marriage was upheld.

The latter portion of the *Jobst* opinion was devoted to an analysis of the propriety of the exception to the marriage termination rule. The Court initially criticized the lower court's characterization of the statutory classification. Whereas the district court had identified the classification as distinguishing between marriages of disabled beneficiaries to other disabled persons on the basis of whether or not the latter is receiving benefits,[32] the Supreme Court found that the statutory scheme had a much broader effect. Both the general marriage rule itself and the exception to it were said to affect persons who were not disabled.[33] It was therefore held that "[t]he broad legislative classification must be judged by reference to characteristics typical of the affected classes rather than by focusing on selected, atypical examples."[34] The Court undertook to make such a judgment in the balance of its opinion.

The exception was said to recognize that where two persons who receive benefits marry, the fact of marriage—upheld as a general indicator of probable dependency[35]—is not likely to alter the dependent

the doctrine of those cases into a virtual engine of destruction for countless legislative judgments which have heretofore been thought wholly consistent with the Fifth and Fourteenth Amendments to the Constitution." *Id.* at 772. *Cf.* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Vlandis v. Kline, 412 U.S. 441 (1973); Stanley v. Illinois, 405 U.S. 645 (1972).

29. 434 U.S. at 53.

30. *Id.*

31. *Id.* at 53-54 (citing Mathews v. De Castro, 429 U.S. 181, 185 (1976), *discussed in* notes 9 & 23 *supra*; Weinberger v. Salfi, 422 U.S. 749, 768-70 (1975), *discussed in* note 28 *supra*).

32. *See* note 14 and accompanying text *supra*.

33. 434 U.S. at 55 & n.12.

34. *Id.* at 55.

35. *See* note 31 and accompanying text *supra*.

status of either spouse.[36] The Court found it reasonable "for Congress to ameliorate the severity of the [marriage termination] rule by protecting both spouses from the dual hardship which it effected."[37] Since Jobst was arguing that his hardship was just as great as that against which the exception protected, because of his wife's disability, his challenge was characterized as an underinclusion attack on the statute.[38] The Court found that even if such an attack were sustained, Jobst would not necessarily be entitled to relief since the legislation has a "nation-wide impact" and the equities of individual cases such as Jobst's would not control.[39] Moreover, even if it could be assumed that the legislative intent was, as the lower court found, to continue support for those beneficiaries whose marriage did not change their economic status,[40] an assumption the Court was unwilling to make,[41] the limitation on the types of marriages to which the exception applies—marriages between two persons receiving benefits under the Act—was found to be justified. The analysis on this point was characteristic of the Court's deferential attitude towards social welfare

36. 434 U.S. at 55.

37. *Id.* In an explanatory footnote the Court stated, "The fact that marriage characteristically signifies the end of a child's dependency on parental support justifies a general rule terminating benefits when a child marries. The fact that a marriage between two spouses who are both receiving dependents' benefits does not characteristically signify a similar change in economic status justifies the exception. In other words, since the justifying characteristic of the general class does not apply to the excepted class, the exception rests on a reasonable predicate. This is true even though some members of each class may possess the characteristic more commonly found in the other class." *Id.* at 55 n.13.

38. *Id.* at 56. Underinclusive classifications do not include all who are similarly situated with respect to a rule. In situations invoking only the rational basis standard of review, *discussed in* note 6 *supra*, the Court has been unwilling to sustain such attacks: "[T]he reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955). *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 997-98 (1978). *See generally* Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

39. 434 U.S. at 56 n.14 (citing *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1136-37 (1968)). If an equal protection violation was found to exist, it could be cured either by invalidating the entire exception or by enlarging it. 434 U.S. at 56 n.14. If the former remedy was chosen, Jobst would still not receive secondary benefits under the Act. If the latter remedy was chosen, some new test of dependency would have to be formulated. Since all beneficiaries who marry needy nonbeneficiaries would be as disadvantaged as Jobst, merely enlarging the statutory exception to include marriages among physically handicapped persons would not make the exception constitutionally valid. *Id.*

40. *See* note 15 and accompanying text *supra*.

41. *See* 434 U.S. at 56 n.15. "We note . . . that Congress could have rationally concluded that beneficiaries who marry other beneficiaries present a more compelling case for legislative relief than beneficiaries who marry needy nonbeneficiaries. Secondary beneficiaries who marry each other lose two sets of benefits and thus may suffer a greater loss than does a couple that sacrifices only one set of benefits." *Id.*

legislation.[42]

The exception to the general rule was said to be easy to administer.[43] It does not require an individualized inquiry as to hardship or need;[44] it avoids the necessity for a periodic review of the beneficiary's entitlement; and it is a reliable indicator of probable hardship.[45] Based on these factors the Court concluded, "Congress could reasonably take one firm step toward the goal of eliminating the hardship caused by the general marriage rule without accomplishing its entire objective in the same piece of legislation."[46] The Court found that the criticism that the limitation of the exception has an adverse impact on a secondary beneficiary's desire to marry and may make him or her a less welcome suitor would apply to any limited exception to the rule.[47] Since Congress was not motivated by antagonism toward any class of marriages or marriage partners, but rather intended simply to remedy a particular injustice—the simultaneous loss of benefits when dependent, covered individuals marry—the exception could not be attacked as an impermissible interference with the right to marry.[48]

The crucial question before the lower court, whether it was constitutionally permissible to create two classes of child's insurance benefi-

42. *See* note 6 *supra.*

43. 434 U.S. at 56-57. Administrative convenience is not, however, a universally valid justification for discriminatory treatment. *See* Frontiero v. Richardson, 411 U.S. 677, 690 (1973) (plurality opinion) ("any statutory scheme which draws a sharp line between the sexes, *solely* for the purpose of achieving administrative convenience, necessarily commands 'dissimilar treatment for men and women who are . . . similarly situated,' and therefore involves the 'very kind of arbitrary legislative choice forbidden by the [Constitution] . . . .' " (citing Reed v. Reed, 404 U.S. 71, 76, 77 (1971) (emphasis in original)). It should be noted, however, that *Frontiero* involved gender-based discrimination, which is subject to a higher standard of review than the rational relation test, Craig v. Boren, 429 U.S. 190, 197 (1976) ("classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives"). In contrast, Mathews v. Lucas, 427 U.S. 495 (1976) held that, "presumptions in aid of administrative functions, though they may approximate, rather than precisely mirror, the results that case-by-case adjudication would show, are permissible under the Fifth Amendment, so long as that lack of precise equivalence does not exceed the bounds of substantiality tolerated by the applicable level of scrutiny." *Id.* at 509. Since *Lucas* involved discrimination based on illegitimacy, which has been held not to be a "suspect" classification, *id.* at 506, and so requires only a "rational relation" analysis, administrative convenience will constitute a sufficient justification for a statutorily mandated discrimination that does not invoke more than minimal scrutiny.

44. 434 U.S. at 57. In an explanatory footnote to this finding, the Court noted that Congress was reluctant to use such individualized determinations. *Id.* at 57 n.16.

45. *Id.* at 57.

46. *Id.* (citing Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955), *quoted in* note 38 *supra*).

47. 434 U.S. at 58.

48. *Id.*

ciaries—those who married fellow beneficiaries and those who did not[49]—was framed in the Supreme Court to consider whether it was permissible to distinguish between classes of marriages of beneficiaries.[50] Although the Court squarely faced the question of whether terminating benefits upon marriage operated in some way to interfere with an individual's choice to marry, the Court deftly resolved the issue without defining the parameters of the individual's right to marry.[51] Obliquely hinting at such a right, the Court explained that the general marriage rule is not invalidated "simply because some persons who might otherwise have married were *deterred* by the rule or because some who did marry were *burdened* thereby."[52] This qualification is significant when *Jobst* is read together with *Zablocki v. Redhail*,[53] where the Court candidly announced a "fundamental" right to marry.[54] The majority in *Zablocki* reconciled its holding with that in *Jobst* by pointing out that the statute in *Zablocki* interfered "directly and substantially with the right to marry."[55] The result, vis-à-vis the individual's constitutionally protected interest in marriage,[56] is the permissibility of a "deterrence" to or "burden" upon marriage upheld in *Jobst* in contrast with the "direct and substantial" interference held unconstitutional in *Zablocki*.[57]

49. *See* notes 13-18 and accompanying text *supra*.

50. 434 U.S. at 54.

51. As discussed in Zablocki v. Redhail, 434 U.S. 374 (1978), *see* notes 74-168 and accompanying text *infra*, the "right to marry" has achieved the status of a fundamental right this term.

52. 434 U.S. at 54 (emphasis added) (footnote omitted).

53. 434 U.S. 374 (1978).

54. *Id.* at 383.

55. *Id.* at 387.

56. *Id.* at 383-87.

57. The line between deterrence or burden on the one hand, and direct and substantial interference on the other, is uncertain and ill-defined at best. As succinctly stated by Justice Powell in his concurrence in *Zablocki*: "The Court does not present, however, any principled means for distinguishing between the two types of regulations. Since state regulation in this area typically takes the form of a prerequisite or barrier to marriage or divorce, the degree of "direct" interference with the decision to marry or to divorce is unlikely to provide either guidance for state legislatures or a basis for judicial oversight." *Id.* at 396-97 (Powell, J., concurring).

The *Jobst* Court appears to be making the same attempt at differentiating between relative interferences with protected rights that has previously plagued the Court in cases relating to the right to travel after its decision in Shapiro v. Thompson, 394 U.S. 618 (1969), *see, e.g.*, McCarthy v. Philadelphia Civil Serv. Comm'n, 424 U.S. 645 (1976); Sosna v. Iowa, 419 U.S. 393 (1975); and the "right" to an abortion after Roe v. Wade, 410 U.S. 113 (1973), *see, e.g.*, Maher v. Roe, 432 U.S. 464 (1977). The basic postulate of this tendency is that "fundamental" rights are not absolute, and that some degree of infringement of such rights is therefore constitutional. This may reflect a growing concern within the Court to move away from the rational basis/strict scrutiny dichotomy toward an intermediate analysis where deci-

The Court in *Jobst* indicated that merely a rational basis for the marriage rule was sufficient to sustain the statute because no considerations relating to a suspect class[58] were involved, nor was there any attempt to interfere with a fundamental right.[59] As the Court framed the distinction, the marriage rule is not "merely an unthinking response to stereotyped generalizations about a traditionally disadvantaged group [n]or . . . an attempt to interfere with the individual's freedom to make a decision as important as marriage."[60] A finding that "suspect" criteria were utilized in the formulation of the statute, or that there was a deliberate legislative intent to interfere with the right to marry, would

sional outcomes are not foreordained by categorization of interests as "fundamental" or classifications as constitutionally "suspect." *See* Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972) [hereinafter cited as Gunther]; Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral and Permissive Classifications*, 62 GEO. L.J. 1071 (1974); Wilkinson, *The Supreme Court, The Equal Protection Clause and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945 (1975).

Justice Marshall has been a vocal critic of the two-tiered approach to constitutional analysis. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 318-21 (1976) (Marshall, J., dissenting); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting).

58. "Suspect" classifications have been found in legal restrictions which curtail the civil rights of a single racial group, *see* Loving v. Virginia, 388 U.S. 1 (1967); Strauder v. West Va., 100 U.S. 303 (1879); or which discriminate based on alienage, *see* Graham v. Richardson, 403 U.S. 365 (1971). *But see* Foley v. Connelie, 435 U.S. 291 (1978). The identifying characteristic of suspectness, the *Jobst* Court emphasized, is the "unthinking response to stereotyped generalizations about a traditionally disadvantaged group." 434 U.S. at 54. Emphasis on these two criteria, stereotyped generalizations in relation to a certain group and traditional disadvantageness, is worthy of note. Both notions are central to what Professor Karst has termed the equality principle of the Fourteenth Amendment. *See* Karst, *Foreword, Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV 1 (1977). Under Professor Karst's view, the substantive core of the Fourteenth Amendment should serve to protect the central values of our society, the respect given to members of society, and the ability to participate fully in society. It is the stigma and stereotyping attached to what the Court calls "suspect" classes that inhibits the class members' exercise of equal citizenship. Because respect and participation in society are crucial, legislation which hinders these values must be carefully scrutinized by the Court. Professor Karst identifies two subordinate values of equal citizenship—participation and responsibility. The more an inequality stigmatizes and thus impairs participation, the more the substantive concept of equal citizenship demands state justification. *Id.* at 9.

59. Involvement of a "fundamental" right triggers a more stringent standard of review. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 29 (1973). If legislation infringes upon the free exercise of some fundamental personal right or liberty, it will be subject to strict scrutiny by the Court. Skinner v. Oklahoma, 316 U.S. 535 (1942), was the genesis of the "fundamental right" concept that required "strict scrutiny" and laid the cornerstone for the constitutional right of privacy. *See* note 1 *supra*. Other fundamental rights are the right to travel, Shapiro v. Thompson, 394 U.S. 618 (1969), and the right to vote, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966). *See* sources cited at note 57 *supra*.

60. 434 U.S. at 54 (footnotes omitted).

impliedly have necessitated some further substantiation beyond mere administrative convenience, which was the state's main contention in support of the Act.[61] The first consideration would be relevant were stereotypes about sex,[62] national origin,[63] or race[64] found to have shaped the statute. The second consideration would be implicated only if there were a showing of a conscious attempt on the part of the legislature to interfere with a beneficiary's marriage.[65] The Court carefully ascribed a benign purpose to the marriage rule, noting that Congress had simply recognized that marriage traditionally brings a change in status.[66]

As noted above, the Court did not specify "suspect" classes or "fundamental" rights as such as competing considerations. Rather, the Court referred to stereotypes affecting legislative judgment on the one hand and intentional interferences "with the individual's freedom to make a decision as important as marriage" on the other.[67] This second evaluative criterion is taken from last term's opinion in *Whalen v. Roe*,[68] also a unanimous decision authored by Justice Stevens. In *Whalen*, the Court held that no right or liberty protected by the Fourteenth Amendment was invaded by a New York statute that required

61. *See* notes 58 & 59 *supra.*

62. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973).

63. *See, e.g., In re* Griffiths, 413 U.S. 717 (1973); Sugarman v. Dougall, 413 U.S. 634 (1973); Graham v. Richardson, 403 U.S. 365 (1971); Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948). *But cf.* Foley v. Connelie, 435 U.S. 291 (1978).

64. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967); Civil Rights Cases, 109 U.S. 3 (1883) (Harlan, J., dissenting); Strauder v. West Va., 100 U.S. 303 (1879).

65. The language of "attempted interference" with individual freedom to make an important family choice was also emphasized in Zablocki v. Redhail, 434 U.S. 374 (1978). Chief Justice Burger, concurring in *Zablocki*, distinguished the two cases by noting that the Social Security Act provision challenged in *Jobst* did not constitute an attempt at interference with an important personal choice, whereas the Wisconsin statute at issue in *Zablocki* was characterized as an "intentional and substantial interference with the right to marry." 434 U.S. at 391 (Burger, C.J., concurring). This emphasis on legislative intent should be compared with two recent decisions: Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977), and Washington v. Davis, 426 U.S. 229 (1976). Those cases refined the distinction between de jure and de facto discrimination. *Washington* held that a qualifying test administered to applicants for positions as police officers was not violative of equal protection even though four times as many blacks failed the test as whites. The Court stated that racially disproportionate impact alone is not sufficient proof of invidious discrimination to strike down a law under the equal protection clause; instead, such laws or official acts must also reflect a racially discriminatory purpose. 426 U.S. at 242; *accord*, Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. at 265.

66. 434 U.S. at 54 n.11.

67. *Id.* at 54.

68. 429 U.S. 589 (1977).

all prescriptions for certain habit-forming drugs to be recorded in a central computer file for investigative purposes.[69] Plaintiffs' principal contention was that a constitutionally protected "zone of privacy" was being invaded by the statutory scheme for recordkeeping.[70] The Court noted that "[l]anguage in prior opinions of the Court or its individual Justices provides support for the view that some personal rights 'implicit in the concept of ordered liberty' . . . are so 'fundamental' that an undefined penumbra may provide them with an independent source of constitutional protection."[71] The Court characterized these privacy interests as being comprised of two distinct types: "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions."[72] It is the latter interest that Justice Stevens refers to as potentially protected in *Jobst*. The universality and reiteration of this broad categorization of privacy interests—those relating to "certain kinds of important decisions,"—will undoubtedly be valuable in future litigation seeking to extend the parameters of constitutionally protected private interests in family matters.[73]

69. *Id.* at 603-04.

70. *Id.* at 598.

71. *Id.* at 598 n.23.

72. *Id.* at 599-600 (footnotes omitted). Under the former category of interests, the Court cited Olmstead v. United States, 277 U.S. 438 (1928), in which the "right to be let alone" was characterized as "the right most valued by civilized men," *id.* at 478 (Brandeis, J., dissenting); Griswold v. Connecticut, 381 U.S. 479 (1965), where the Court stated that "the First Amendment has a penumbra where privacy is protected from governmental intrusion," *id.* at 483; and California Bankers Ass'n v. Schultz, 416 U.S. 21 (1974) (Powell, J., concurring; Marshall, J., dissenting). *California Bankers Ass'n* upheld certain recordkeeping and reporting requirements of the Bank Secrecy Act of 1970. Justice Powell's concurrence was limited to the narrow regulations before the Court, but he emphasized that "[a]t some point, governmental intrusion upon [intimate areas of an individual's personal affairs] would implicate legitimate expectations of privacy." *Id.* at 79 (Powell, J., concurring). Justice Douglas affirmed that fundamental personal rights are involved when "the Government gets large access to one's beliefs, ideas, politics, religion, cultural concerns, and the like." *Id.* at 85-86 (Douglas, J., dissenting).

Griswold was the landmark decision that identified a constitutional "right to privacy" that encompassed a married couple's decision to use contraceptives. The doctrinal basis of the right to privacy was found by the majority in the "penumbras" of selected provisions of the Bill of Rights, by Justice Goldberg in the Ninth Amendment, and by Justices Harlan and White in the due process clause of the Fourteenth Amendment. The basis for the right of privacy remains unclear, but it is agreed that such a right exists. *See* Carey v. Population Servs. Int'l., 431 U.S. 678 (1977); Whalen v. Roe, 429 U.S. 589 (1977); Roe v. Wade, 410 U.S. 113 (1973).

73. The cases cited by the Court in Whalen v. Roe, 429 U.S. 589 (1977), support somewhat this broad interpretation of a constitutionally protected interest in independence in making certain kinds of important decisions. *See* 429 U.S. 600 n.26. The concept is not limited strictly to decisions regarding family matters, as Allgeyer v. Louisiana, 165 U.S. 578

B. Marriage as a Fundamental Right

The right to marry was declared fundamental in *Zablocki v. Redhail*,[74] which held that a statutory classification which significantly interfered with the exercise of the right to marry was subject to strict scrutiny. The object of this critical examination, a Wisconsin statute[75]

(1897), cited by the *Whalen* Court, held it was a deprivation of liberty under the due process clause of the Fourteenth Amendment to prohibit contracts of marine insurance between Louisiana residents and non-resident non-admitted foreign insurers.

74. 434 U.S. 374, 383 (1978) (Marshall, J., writing for the Court).

75. WIS. STAT. § 245.10(1), (4), (5) (1973) read: "(1) No Wisconsin resident having minor issue not in his custody and which he is under obligation to support by any court order or judgment, may marry in this state or elsewhere, without the order of either the court of this state which granted such judgment or support order, or the court having divorce jurisdiction in the county of this state where such minor issue resides or where the marriage license application is made. No marriage license shall be issued to any such person except upon court order. The court, within 5 days after such permission is sought by verified petition in a special proceeding, shall direct a court hearing to be held in the matter to allow said person to submit proof of his compliance with such prior court obligation. No such order shall be granted, or hearing held, unless both parties to the intended marriage appear, and unless the person, agency, institution, welfare department or other entity having the legal or actual custody of such minor issue is given notice of such proceeding by personal service of a copy of the petition at least 5 days prior to the hearing, except that such appearance or notice may be waived by the court upon good cause shown, and, if the minor issue were of a prior marriage, unless a 5-day notice thereof is given to the family court commissioner of the county where such permission is sought, who shall attend such hearing, and to the family court commissioner of the court which granted such divorce judgment. If the divorce judgment was granted in a foreign court, service shall be made on the clerk of that court. Upon the hearing, if said person submits such proof and makes a showing that such children are not then and are not likely thereafter to become public charges, the court shall grant such order, a copy of which shall be filed in any prior proceeding . . . or divorce action of such person in this state affected thereby; otherwise permission for a license shall be withheld until such proof is submitted and such showing is made, but any court order withholding such permission is an appealable order. Any hearing under this section may be waived by the court if the court is satisfied from an examination of the court records in the case and the family support records in the office of the clerk of court as well as from disclosure by said person of his financial resources that the latter has complied with prior court orders or judgments affecting his minor children, and also has shown that such children are not then and are not likely thereafter to become public charges. No county clerk in this state shall issue such license to any person required to comply with this section unless a certified copy of a court order permitting such marriage is filed with said county clerk.

. . . .

"(4) If a Wisconsin resident having such support obligations of a minor, as stated in sub. (1), wishes to marry in another state, he must, prior to such marriage, obtain permission of the court under sub. (1), except that in a hearing ordered or held by the court, the other party to the proposed marriage, if domiciled in another state, need not be present at the hearing. If such other party is not present at the hearing, the judge shall within 5 days send a copy of the order of permission to marry, stating the obligations of support, to such party not present.

"(5) This section shall have extraterritorial effect outside the state; and § 245.04(1) and (2) [providing that out-of-state marriages to circumvent Wisconsin law are void] are applicable hereto. Any marriage contracted without compliance with this section, where such com-

prohibiting the marriage of any state resident under an obligation to support minor children without a court order, which could only be granted upon a showing both that the support obligation had been met and that the children were not then or in the future likely to become public charges, was held to violate the equal protection clause of the Fourteenth Amendment. Chief Justice Burger and Justices Marshall, Brennan, White, and Blackmun joined in an opinion which elevated the right to marry to the status of a constitutionally protected "fundamental right."[76] Justices Powell and Stevens, who concurred in the judgment, agreed that the statute violated principles of equal protection, although Justice Powell also found a due process violation. Justice Stewart based his concurrence entirely on the due process clause of the Fourteenth Amendment. The lone dissent from Justice Rehnquist found neither the due process nor the equal protection clause to be impediments to the statute.

In 1972, while a minor and a high-school student, Roger Redhail was adjudged the father of a child born out of wedlock and was ordered to pay support until the child reached the age of majority.[77] Unemployed and indigent, Redhail had made no such payments when, in September of 1974, he filed an application for a marriage license with defendant county clerk Zablocki. Redhail's application was denied because he did not have a court order directing that the license be issued.[78] Such an order was necessary because of his child support obligation, but it could not be issued unless he showed that he had met the obligation and that the child was not then nor was likely to become a public charge.[79] Clearly unable to meet this burden,[80] Redhail filed a class action on behalf of all Wisconsin residents under support obligations for children not in their custody who had been refused licenses to marry, against a class consisting of all Wisconsin county clerks.[81] He

pliance is required, shall be void, whether entered into in this state or elsewhere." 434 U.S. at 375-77 n.1.

76. For a discussion of fundamental rights and the corresponding level of scrutiny that is applied where the infringement of such a right is alleged, see note 165 *infra*.

77. Redhail v. Zablocki, 418 F. Supp. 1061, 1063 (1976), *aff'd*, 434 U.S. 374 (1978).

78. *Id.* at 1063-64.

79. *See* note 75 *supra*.

80. Not only was Redhail in arrears in his child support payments, but the child was receiving benefits under the Aid to Families with Dependent Children program. He therefore failed both prerequisites to the issuance of a court order granting him permission to marry. It is interesting to note that since the AFDC benefits were greater than the required payments, the child would have been a public charge even if Redhail had met his support obligation. 418 F. Supp. at 1069. He thus would have been barred by the statute from marrying even if he were current in his payments.

81. Since Redhail was alleging violations of the due process and equal protection

sought a declaration that the statute was unconstitutional and a permanent injunction restraining its enforcement.[82] A three-judge district court[83] certified the class[84] and held that the statute violated the equal protection clause of the Fourteenth Amendment.[85]

The lower court characterized the statute as one that created two groups of Wisconsin residents who desire to marry, and subjected one group to special treatment.[86] This group, plaintiff Redhail's class, had to obtain a court order before marrying, which could only be issued upon the showing described above. Any marriage contracted without compliance was void, and persons who obtained marriage licenses without complying with the statute were subject to criminal penalties.[87] Those indigents unable to meet their support obligations were therefore unable to marry so long as they remained Wisconsin residents.[88]

The court was initially faced with the question of the appropriate standard of review against which to measure the statute. The court outlined the two-tiered standard generally employed in equal protection analysis. Measured against the rational relationship test, classifications are upheld "if they are rationally related to some legitimate governmental interest."[89] Alternately, if "the classification impinges upon fundamental rights or constitutes a suspect classification, it is subjected to strict scrutiny and can be upheld only if it is necessary to promote compelling governmental interests and is narrowly drawn to express only such interests."[90] The court found that "although not ex-

clauses of the Fourteenth Amendment, the action was brought under 42 U.S.C. § 1983 (1976) and jurisdiction was conferred by 28 U.S.C. § 1343(3) (1976).

82. 418 F. Supp. at 1063.

83. Because a permanent injunction restraining the enforcement of a state statute was requested, designation of a three-judge court was required. 28 U.S.C. § 2281 (repealed 1976).

84. The plaintiff class was certified under FED. R. CIV. P. 23(b)(2) (1977).

85. 418 F. Supp. 1061 (1976).

86. *Id.* at 1068.

87. WIS. STAT. § 245.30 (1978) reads: "(1) The following shall be fined not less than $200 nor more than $1,000, or imprisoned not more than one year, or both: . . . (f) *Penalty for obtaining license without permission of court.* Any person who obtains a marriage license contrary to or in violation of § 245.10, whether such license is obtained by misrepresentation or otherwise, or whether such marriage is entered into in this state or elsewhere."

88. 418 F. Supp. at 1068-69. Under § 245.10(5), any marriage contracted without compliance with the statute is void, regardless of where it took place.

89. 418 F. Supp. at 1069 (citing United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973)). For a discussion of the rational relation standard of review, see note 6 *supra.*

90. 418 F. Supp. at 1069 (citing Roe v. Wade, 410 U.S. 113 (1973); Shapiro v. Thompson, 394 U.S. 618 (1969)). For a discussion of the strict scrutiny standard of review, see note 105, *supra.*

plicitly set forth in the constitution, there is a constitutionally protected right to marry which occupies the status of being a fundamental right."[91] The individual's interest in marriage, the court noted, has been recognized as coming within the constitutional right of privacy.[92] Finding it "apparent" that the classification created by the statute placed substantial burdens on the plaintiff class members' ability to marry, the court held that the statute must be subjected to strict scrutiny.[93]

The court also held that the wealth discrimination inherent in the statute afforded an additional justification for applying the strict scrutiny standard of review.[94] The court noted that wealth discrimination alone does not afford a sufficient basis for invoking strict scrutiny, but found that two distinguishing characteristics of the affected class would make such discrimination a significant factor in constitutional analysis: poverty resulting in a complete inability to pay for a desired benefit, and, as a consequence, an absolute deprivation of the opportunity to enjoy that benefit.[95] Because the inability of certain members of the plaintiff class to pay child support resulted in the automatic denial to them of the state approval necessary for a legal marriage, strict scrutiny was held to be applicable.[96]

91. 418 F. Supp. at 1069 (citing Roe v. Wade, 410 U.S. 113, 152 (1973); United States v. Kras, 409 U.S. 434, 444 (1973); Boddie v. Connecticut, 401 U.S. 371, 376 (1971); Loving v. Virginia, 388 U.S. 1, 12 (1967); Griswold v. Connecticut, 381 U.S. 479, 486 (1965); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); Meyer v. Nebraska, 262 U.S. 390, 399 (1923)). For a discussion of fundamental rights, see note 105 *infra*.

92. 418 F. Supp. at 1069 (citing Roe v. Wade, 410 U.S. 113, 152-53 (1973)). Later, the Supreme Court upheld this conclusion. 434 U.S. at 384-86.

93. *Id.* at 1069-70.

94. *Id.* at 1070.

95. *Id.* at 1070 (citing San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 20 (1973)). *Cf.* Boddie v. Connecticut, 401 U.S. 371 (1971). In *Boddie*, a state statute requiring the payment of court fees in divorce proceedings was challenged. Noting that, "resort to the state courts is the only avenue to dissolution of their marriages," *id.* at 376, the Supreme Court held the statute a denial of due process of law as applied to indigents who could not pay the fees. *Id.* at 380-81.

96. 418 F. Supp. at 1070. The defendants had argued that a "sliding scale" equal protection analysis should be applied to the facts of the case, citing, *inter alia*, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 30-31 (1973) (Marshall, J., dissenting); Gunther, *The Supreme Court 1971 Term, Foreword, In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection*, 80 HARV. L. REV. 1 (1972). The court rejected this approach because "it is not apparent which contexts require application of the more flexible equal protection approach," and because it found that strict scrutiny was still appropriate where statutory classifications infringe upon fundamental rights. 418 F. Supp. at 1071. The court also noted that the statute probably could not be upheld under such an intermediate standard of review, since a less restrictive means of furthering the governmental interests existed. *Id.* (citing United States Dep't of Agriculture v. Moreno, 413 U.S. 528,

Applying this standard of review, the court noted that the state bears the burden of showing a compelling interest in support of the classification, and that the measure is narrowly drawn to achieve only that interest.[97] The defendants advanced two interests which they asserted were furthered by the statute: (1) providing counselling to prospective marriage partners emphasizing the necessity of fulfilling preexisting support obligations, and (2) protecting the welfare of the children who were the recipients of the support.[98] Reviewing the legislative history, the court found some evidence supporting the contention that counselling had been one of the main objectives of the statute. Even accepting this, however, the court found that it was neither sufficiently compelling to warrant state interference with marriage nor narrowly drawn to implement only that interest, since counselling could be made mandatory without so drastically interfering with marriage.[99] The second justification—safeguarding the children's welfare—was recognized as a conceivably legitimate and compelling state interest, but it was found to be unnecessary to prohibit the future marriages of those under support obligations in order to achieve this interest. Alternative measures already existed to ensure that payments were made, including, *inter alia*, wage garnishment and contempt procedures.[100] Since "statutory provisions give the state alternative means of enforcing the child support obligations of the plaintiff class members which do not abridge their rights to marry,"[101] the children's welfare justification was rejected. Although the court recognized that the state had legitimate interests in regulating the domestic relations of its residents, this statute, not relating to the health or competency of persons to contract marriage, was held to be outside this permissible regulatory sphere.[102]

The Supreme Court agreed with the district court that the statute was unconstitutional under the equal protection clause.[103] Eight Jus-

536-37 (1973); Timberlake v. Kenkel, 369 F. Supp. 456, 466-68 (E.D. Wis. 1974), *vacated and remanded*, 510 F.2d 976 (7th Cir. 1975)).

97. 418 F. Supp. at 1071.

98. *Id.*

99. *Id.* at 1072.

100. *Id.* In addition to such civil remedies, the court noted that the state could charge a nonsupporting parent with a felony—abandonment of a minor child, WIS. STAT. § 52.05 (1978), or a misdemeanor—failure to support a minor child, *id.* § 52.055 (1978).

101. 418 F. Supp. at 1072. The court also noted that since the children who were public charges were receiving support under benefit programs, allowing the marriage would have no effect on their welfare. The court further found that some members of the plaintiff class would actually improve their financial position if they married, due to the likelihood of a working spouse. *Id.* (citing Taylor v. Louisiana, 419 U.S. 522, 535 n.17 (1975)).

102. 418 F. Supp. at 1072.

103. Zablocki v. Redhail, 434 U.S. 374 (1978). The Court noted that Redhail had also

tices found that the statute was not compatible with constitutional guarantees, and seven of those would employ an equal protection, as opposed to due process, analysis to support their opinions.

Following the analytical framework established by the lower court, Justice Marshall began his analysis by noting that the nature of the classification and the individual interests affected would determine what burden of justification the statute must meet under the equal protection clause.[104] Because past decisions had established that the right to marry is of fundamental importance, and since the classification at issue significantly interfered with the exercise of that right, "critical examination" of the state interests advanced in support of the statute was held to be required.[105] The Court cited *Loving v.*

presented a substantive due process argument in support of his case. *Id.* at 382. Redhail had argued that the right of privacy is a liberty protected by the due process clause of the Fourteenth Amendment, and that a number of decisions protecting the right of privacy from unnecessary interference by a state have relied on due process principles. All of the decisions cited by the *Zablocki* Court, notably Roe v. Wade, 410 U.S. 113, 152-53 (1973), did, in fact, base the right to privacy on the due process clause. Exceptions are Griswold v. Connecticut, 381 U.S. 479 (1965), which founded the right to privacy on penumbras emanating from selected provisions of the Bill of Rights, and Skinner v. Oklahoma, 316 U.S. 535 (1942), which held that marriage and procreation are "fundamental to the very existence and survival of the race," *id.* at 541, without citing a textual constitutional authority, and that it was a denial of equal protection to sterilize persons habitually committing certain felonies, but not to sterilize persons committing substantially similar offenses. The *Zablocki* Court did not indicate why it declined to follow the due process approach.

104. *See* 434 U.S. at 383 (citing Memorial Hosp. v. Maricopa County, 415 U.S. 250, 253 (1974)). This should be compared with language Justice Marshall employed in his vigorous dissenting opinion in Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976). Strenuously objecting to the "rigid two-tier model . . . as the Court's articulated description of the equal protection test," Marshall characterized the inquiry he felt the Court had actually undertaken in equal protection cases as follows: "It has focused upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the state interests asserted in support of the classification." *Id.* at 318 (Marshall, J., dissenting).

105. 434 U.S. at 383 (citing Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312, 314 (1976); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973)). Both *Murgia* and *Rodriguez* discuss the two-tier standard of review in the same fashion as does the lower court in *Zablocki*, *see* notes 89 & 90 and accompanying text *supra*.

In his concurring opinion, Justice Powell pointed out that no previous decision concerning regulations touching marriage had found it to be a "fundamental right" triggering the most exacting scrutiny. 434 U.S. at 397. Indeed, while the decisions cited by the majority opinion and the lower court recognize freedom of personal choice in matters of marriage and family life as coming within the concept of liberty protected by the due process clause of the Fourteenth and Fifth Amendments, no court had formulated this freedom as a "fundamental right" that would necessarily invoke strict scrutiny. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973), which states that "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' . . . are included in this guarantee of privacy. . . . [T]he right has *some* extension to activities relating to marriage." *Id.* at 152 (emphasis added). Justice Powell emphasized that the states have long exercised virtually

Virginia[106] as the "leading decision" on the right to marry.[107] *Loving* held that state antimiscegenation laws discriminated on the basis of race in violation of the equal protection clause[108] and deprived interracial couples of a fundamental liberty protected by the due process clause.[109] The Court noted other instances, outside the context of racial discrimination, where marriage had been recognized as fundamental to the existence and the foundation of society.[110] More recent cases, the Court observed, have routinely categorized the decision to marry as among the personal decisions protected by the "right of privacy" first enunciated in *Griswold v. Connecticut*.[111]

The Court thus recognized two cognate bases for the "right to marry." One evolves from the concept of personal liberty secured by

exclusive control over the domestic relations of their citizens, and that the marriage relation traditionally has been subject to regulation, first by the church and later by the state. He argued that "[a] 'compelling state purpose' inquiry would cast doubt on the network of restrictions that the States have fashioned to govern marriage and divorce." 434 U.S. at 399.

106. 388 U.S. 1 (1967).

107. 434 U.S. at 383.

108. Loving v. Virginia, 388 U.S. at 12. However, the Court only stated that, "restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." *Id.* The Court in *Loving* thus focused only on the existence of a racially-based discrimination; it did not state that marriage was a fundamental right.

109. *Id.* Although the Court stated that, "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men," *id.*, and that "[u]nder our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State," *id.*, the *Loving* Court's due process analysis, like its equal protection inquiry, focused on the element of racial discrimination. "The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations." *Id. See* Zablocki v. Redhail, 434 U.S. at 398. (Powell, J., concurring).

110. The Court cited Maynard v. Hill, 125 U.S. 190 (1888); Meyer v. Nebraska, 262 U.S. 390 (1923); Skinner v. Oklahoma, 316 U.S. 535 (1942). *Maynard* upheld the validity of Oregon's divorce laws, stating that because marriage created the most important relation in life, it must be subject to control by the legislature. 125 U.S. at 205. It is ironic that this case should be cited in a landmark decision *circumscribing* the powers of the state to regulate the marriage relation. *Meyer* held a Nebraska statute prohibiting the teaching of foreign languages below the eighth grade level to be a denial of liberty under the due process clause, as the statute unreasonably interfered with the liberty of parents and guardians to direct the education of children under their control. 262 U.S. at 400. *Skinner* held it violative of equal protection to sterilize some felons and not others, although similar offenses were committed. Marriage was described as "fundamental to the very existence and survival of the race." 316 U.S. at 541.

111. 381 U.S. 479 (1965). *See* note 1 *supra*. The Court implied that *Griswold* stood for the proposition that the right to marry is part of the fundamental right to privacy implicit in the due process clause. Zablocki v. Redhail, 434 U.S. at 384. *Griswold* in fact found the right to privacy in the penumbra of selected provisions of the Bill of Rights, 381 U.S. at 484. Only the concurring opinions of Justices White and Harlan based the constitutional right to privacy on the due process clause. *See id.* at 500 (Harlan, J., concurring), 502 (White, J., concurring).

the due process clause. As the Court stated in *Roe v. Wade*,[112] a decision relied on by the *Zablocki* majority, "[previous] decisions make it clear that . . . personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' . . . are included in this guarantee of personal privacy."[113] A second basis is the personal freedom of choice in matters of marriage and family life.[114] Last term, *Whalen v. Roe*[115] identified this freedom of choice aspect in significant decisions in life as one of the two main interests secured by a constitutionally-based "zone of privacy."[116] Apart from these precedents, the *Zablocki* Court reasoned further that inasmuch as the woman whom Redhail desired to marry had the protected right either to secure an abortion of their expected child or to rear it as an illegitimate child, the decision of the couple to marry and bring the child into a traditional family setting should receive equivalent protection.[117]

The test Wisconsin had to meet in light of the fundamental character of the right to marry was that its enactment be supported by "sufficiently important state interests and [be] closely tailored to effectuate only those interests."[118] The state profferred the same justifications for

112. 410 U.S. 113 (1973).

113. *Id.* at 152 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)). The majority in *Roe* held that the right of privacy was "founded in the Fourteenth Amendment's concept of personal liberty." *Id.* at 153. This concept of the substantive content of the due process clause serving as the source of the right of privacy was reiterated in Whalen v. Roe, 429 U.S. 589, 598 n.23 (1977). *Whalen*, authored by Justice Stevens, also cited Justice Stewart's concurrence in Roe v. Wade and Justice Harlan's concurrence in Griswold v. Connecticut, two strongly worded substantive due process decisions. *Id.* Both Roe v. Wade and Whalen v. Roe therefore indicate strong support for a substantive due process argument in the context of privacy interests. *See also* Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977) (plurality opinion). Although the trend seemed to be towards a due process basis for the fundamental right to privacy, the *Zablocki* Court preferred to use an equal protection approach.

114. *See* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974): "This court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *LaFleur* struck down mandatory maternity leave rules promulgated by various school boards noting that, "[b]y acting to penalize the pregnant teacher for deciding to bear a child, overly restrictive maternity leave regulations can constitute a heavy burden on the exercise of . . . protected freedoms." *Id.* at 640.

115. 429 U.S. 589 (1977).

116. *Id.* at 598-99. "The cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is *the interest in independence in making certain kinds of important decisions.*" (emphasis added) (footnotes omitted). *Id.*

117. 434 U.S. at 386.

118. *Id.* at 388 (citing Carey v. Population Servs. Int'l, 431 U.S. 678, 686 (1977); Memorial Hosp. v. Maricopa County, 415 U.S. 250, 262-63 (1974); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 16-17 (1973); Bullock v. Carter, 405 U.S. 134, 144 (1972)).

the measure as had been previously advanced.[119] The Supreme Court, upholding the lower court, rejected both the "counselling" and the "collection device" rationales.[120] The Court noted that the statute "was intended merely to establish a mechanism whereby persons with support obligations to children from prior marriages could be counselled before they entered into new marital relationships and incurred further support obligations," and the "permission [to marry] was automatically to be granted after counselling was completed."[121] The Court found, however, that the statute as enacted neither required counselling nor provided for automatic granting of permission.[122] Since this purported jsutification—ensuring counselling—was not actually served by the statute, it was held insufficient to validate it.[123] As to the "collection device" rationale, the Court found that preventing the marriage of one unable to meet the statutory requirements did nothing to benefit the children to be supported.[124] Additionally, the State had other, less intrusive means of enforcing the support obligation, such as wage garnishments, civil contempt proceedings, and criminal penalties.[125] This justification was therefore also rejected. Finally, the State had suggested that the statute protected the welfare of the prior children by preventing new support obligations from being incurred. In response, the Court stated that the provisions were both underinclusive, in that they did not limit the incurrence of other additional financial obligations other than those attending a new marriage, and overinclusive, inasmuch as a new marriage might in fact contribute to one's ability to meet his or her support payments.[126] In the final analysis, the Court aptly noted, preventing marriage will not necessarily mean that additional support obligations to other children will not arise, as they are incurred whether children are born in or out of wedlock.[127] The justifications advanced in support of the classification were thus found

119. The justifications were to provide counselling to the applicant as to the necessity of fulfilling prior support obligations, and the protection of the welfare of the children to whom that obligation was owed. 434 U.S. at 388.

120. The Court assumed for purposes of analysis that these justifications were "legitimate and substantial interests." *Id.*

121. *Id.* (footnotes omitted).

122. *Id.* The Court concluded that "it can hardly be justified as a means for ensuring counselling of the persons within its coverage." *Id.* at 388-89.

123. *Id.* at 389. The Court went on to note that even if counselling does take place, an open question since there was no evidence that it did, there was no justification for withholding permission to marry once it was completed. *Id.*

124. *Id.*

125. *Id.* at 389-90.

126. *Id.* at 390.

127. *Id.* "Since the support obligation is the same whether the child is born in or out of

insufficiently served by its application, and the district court's opinion was accordingly affirmed.

The Court was careful to distinguish the facts of Roger Redhail's case from those of John Jobst's. Since Redhail was "absolutely prevented from getting married" by the statute, it "directly and substantially" interfered with his constitutional right to marry.[128] The regulations within the Social Security Act that deprived Jobst of his benefits, by contrast, were characterized as "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship" and therefore may be legitimately imposed.[129] The Court created, in effect, exceptions to the rule of strict scrutiny that was applied in *Zablocki* to invalidate the legislative classification. Without specifying which regulations may be permissible or under what standards, the Court stated that not every enactment pertaining to the incidents of or prerequisites to marriage must be subjected to "rigorous scrutiny."[130] The result is a highly protected "fundamental right to marry," but one which is not absolute and which presumably would not extend beyond the decision to enter into a traditional, two-party, heterosexual union.

In their concurring opinions, both Justices Powell and Stevens stated that they would not elevate marriage to the status of a fundamental right invoking a compelling state interest analysis.[131] Although both Justices recognized that the individual's interest in marriage merits special constitutional protection, each also stressed that marriage is not "an interest which is constitutionally immune from evenhanded regulation."[132] In their view, laws prohibiting the intermarriage of family members, for example, although "directly and substantially" interfering with the right to marry, would clearly be upheld by the Court.[133] In contrast to the majority's approach, Justices Powell and Stevens would apply only an intermediate standard of review.[134]

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wedlock, the net result of preventing the marriage is simply more illegitimate children." This is exactly what occurred in Redhail's case.

128. *Id.* at 387.

129. *Id.* at 386-87. *See also id.* at 391 (Burger, C.J., concurring). For a criticism of the direct and substantial/reasonable regulation distinction, see *id.* at 396 (Powell, J., concurring), discussed in note 105 *supra.*

130. 434 U.S. at 386.

131. *Id.* at 396 (Powell, J., concurring), 406 n.10 (Stevens, J., concurring). *See also id.* at 392 (Stewart, J., concurring) ("I do not agree with the Court that there is a 'right to marry' in the constitutional sense").

132. *Id.* at 404 (Stevens, J., concurring). *See also id.* at 396 (Powell, J., concurring).

133. *Id.* at 396 (Powell, J., concurring), 404 (Stevens, J., concurring).

134. *Id.* at 397 (Powell, J., concurring), 406 n.10 (Stevens, J., concurring). Both Justices

Justices Stewart and Powell both based their concurrences on the deliberate discrimination against the poor inherent in the application of the statute. As Justice Stewart phrased it: "[A] person's inability to pay money demanded by the State does not justify the total deprivation of a constitutionally protected liberty."[135] And in Justice Powell's words, "[t]he vice inheres not in the collection concept, but in the failure to make provision for those without the means to comply with child support obligations."[136] The absolute foreclosure of indigents with child support obligations from entering into a legal marriage suggested a strong parallel with *Boddie v. Connecticut*.[137] *Boddie* held that a state could not require the payment of filing fees as a prerequisite to its granting a divorce, a function which the state alone was empowered to perform. Since Wisconsin did not recognize marriages of its residents not complying with the statute,[138] there was in *Zablocki* a monopolization of a vital mechanism analogous to that found in *Boddie*. Consequently, the discrimination against the truly indigent rendered the statute unconstitutional.[139]

Justice Stevens' analysis in his concurring opinion was analogous to the approach taken by Justices Stewart and Powell in that it focused on the statute's discrimination against the poor. But while Justices Stewart and Powell cited *Boddie* as precedent and thus found a due process violation,[140] Justice Stevens echoed the majority opinion by

cited their concurring opinions in Craig v. Boren, 429 U.S. 190 (1976), wherein they noted that the Court had not, in reality, followed the traditional two-tiered approach to equal protection analysis. *See id.* at 210 n.* (Powell, J., concurring), 211-12 (Stevens, J., concurring).

135. *Id.* at 394 (Stewart, J., concurring).

136. *Id.* at 400 (Powell, J., concurring).

137. 401 U.S. 371 (1971) (Harlan, J.).

138. *See* note 88 *supra*.

139. Because the basis of their opinions on this point was the holding in Boddie v. Connecticut, 401 U.S. 371 (1971), both Justices found a violation of the due process rights of indigent persons desirous of marrying but who were barred from doing so by their economic status. 434 U.S. at 383. This is a departure from the majority's analysis, which focused solely on the perceived equal protection violation. *See* note 103 and accompanying text *supra*. However, Justice Powell also found an equal protection violation in that "[t]he challenged provisions . . . are so grossly underinclusive with respect to [the objective of preserving the ability of marriage applicants to support their prior issue by preventing them from incurring new obligations], given the many ways that additional financial obligations may be incurred by the applicant quite apart from a contemplated marriage, that the classification 'does not bear a fair and substantial relation to the object of the legislation.' 434 U.S. at 402 (Powell, J., concurring) (quoting Craig v. Boren, 429 U.S. 190, 211 (1976)). As noted previously, *see* note 134 and accompanying text *supra*, this represents the application of an intermediate standard of equal protection review.

140. *See* note 139 *supra*.

measuring the statute against the equal protection clause.[141] Although noting that classifications based on marital status are frequently upheld, he found that "[a] classification based on marital status is fundamentally different from a classification which determines who may lawfully enter into the marriage relationship."[142] Since the second type of classification affects an interest "sufficiently important to merit special constitutional protection,"[143] the deference to the legislative judgment exhibited in *Jobst* was inappropriate in this situation. To Justice Stevens, the controlling factor was that "a person's economic status may determine his eligibility to enter into a lawful marriage."[144] Upon examination of the statutory provisions, he concluded that they reflected a series of irrational legislative assumptions about the affected class of persons.

Justice Stevens initially noted that the statute bars marriages which might actually improve a couple's financial situation—those where the intended spouse is economically independent. He reasoned that this reflected a legislative judgment "(a) that only fathers would be affected by the legislation, and (b) that they would never marry employed women."[145] Finding neither assumption tenable,[146] he concluded that by preventing such marriages the statute "not only rests on unreliable premises, but also defeats its own objectives."[147] An addi-

141. Justice Stevens was unable to join the majority opinion, however, because he did not believe that strict scrutiny was the appropriate standard of review for the statute. *See* 434 U.S. at 406 n.10 (Stevens, J., concurring).

142. *Id.* at 403-04 (Stevens, J., concurring) (footnote omitted). In an explanatory footnote, he stated that the classification in *Jobst*, *discussed in* notes 10-18 & 49-50 and accompanying text *supra*, was in the first category, while that in Loving v. Virginia, 388 U.S. 1 (1967), *discussed in* notes 106-09 and accompanying text *supra*, was in the second. 434 U.S. at 404 n.2.

143. 434 U.S. at 404 (Stevens, J., concurring) (citing Whalen v. Roe, 429 U.S. 589, 599-600 (1977)).

144. 434 U.S. at 404 (Stevens, J., concurring). Finding that even those parents who had met their support obligations would be prevented from marrying if their children were still public charges, Justice Stevens concluded that, "within the class of parents who have fulfilled their court-ordered obligations, the rich may marry and the poor may not. This type of statutory discrimination is, I believe, totally unprecedented, as well as inconsistent with our tradition of administering justice equally to the rich and to the poor." *Id.* (Stevens, J., concurring) (footnotes omitted).

145. *Id.* at 405 (Stevens, J., concurring).

146. This first assumption was said to ignore "the fact that fathers are sometimes awarded custody," and the second assumption "ignores the composition of today's work force." *Id.* (footnotes omitted). In an explanatory footnote, Justice Stevens stated that, "both of these assumptions are the product of a habitual way of thinking about male and female roles 'rather than analysis or actual reflection.' " *Id.* at 405 n.8 (quoting Califano v. Goldfarb, 430 U.S. 199, 222 (1977)).

147. 434 U.S. at 405 (Stevens J., concurring).

tional defect was found in that the statute applied only to the noncustodial parent; the parent with custody of the children does not need the permission to marry. Since "the danger that new children will further strain an inadequate budget is equally great for custodial and noncustodial parents,"[148] the legislature must have assumed "(a) that only mothers will ever have custody and (b) that they will never marry unemployed men."[149] Being the converse of the assumptions previously rejected, these judgments were also found irrational.[150] Finally, Justice Stevens found that the statute failed to regulate the marriages of the most impoverished persons—those least likely to be able to afford another family—because such persons are unlikely to have support obligations, the triggering event for the statute. This too was found to be irrational because "[i]f the State meant to prevent the marriage of those who have demonstrated their inability to provide for children, it overlooked the most obvious targets of legislative concern."[151] Because of the lack of validity of the assumptions he found implicit in the statutory scheme, Justice Stevens concluded, "this clumsy and deliberate legislative discrimination between the rich and the poor is irrational in so many ways that it cannot withstand scrutiny under the Equal Protection Clause of the Fourteenth Amendment."[152]

The last principal point of difference between the majority and concurring opinions is embodied in Justice Stewart's conception of the majority's approach as a misapplication of equal protection analysis. The equal protection clause is invoked where invidiously discriminatory classifications, such as those based on race, are challenged.[153] Justice Stewart would find no substantive rights or freedoms in the equal protection clause; rather, marriage is within the sphere of liberty protected by the due process clause.[154] The problem, then, is one of an encroachment upon that constitutionally protected freedom. Justice Stewart was clearly accurate in that the precedents relied upon by the majority place the interest in marriage within the scope of liberties protected by the due process clause, as the majority opinion itself con-

148. *Id.* at 405-06 (Stevens, J., concurring).

149. *Id.* at 406 (Stevens, J., concurring).

150. *Id. See* note 146 *supra.*

151. 434 U.S. at 406 (Stevens, J., concurring).

152. *Id.* (footnote omitted). Although this language suggests that Justice Stevens was applying a rational relation analysis, *see* note 6 *supra,* he suggested in a footnote that an intermediate level of scrutiny was required. *Id.* at 406 n.10 (Stevens, J., concurring) (citing Craig v. Boren, 429 U.S. 190, 211 (1976)). *See* note 134 and accompanying text *supra.*

153. *See generally,* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 991-1136 (1978); J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 515-687 (1978).

154. 434 U.S. at 391-92 (Stewart, J., concurring).

ceded.[155] It can just as clearly be stated, however, as did the lower court, that the statute created two classes of persons: those who may marry and those who must seek court orders and meet certain prerequisites before they may marry.[156] This classification thus created two groups of persons and discriminated against one because it infringed upon its members' rights to enter into the marriage relationship.[157]

The majority's choice of couching the constitutional violation in terms of equal protection rather than due process may indicate that the Court is disenchanted with the expanding rights of privacy that have been developed under the due process clause,[158] that the Court is disinclined to follow the substantive due process approach taken by a plurality of the Court in *Moore v. City of East Cleveland*,[159] or simply that the equal protection analysis was presented to the Court in a superior fashion and was the rationale with which the majority of Justices could be comfortable. In any event, Justice Stewart stands alone in his preference for founding his constitutional objections to the statute solely on the due process clause.

In his dissenting opinion, Justice Rehnquist argued that the legislative judgment was entitled to the traditional presumption of validity; he would apply the rational basis standard of review to the statute.[160] He characterized the statute as a permissible regulation of family life and as a measure to assure the support of minor children.[161] Justice Rehnquist would not differentiate between the burdens imposed upon marriage in *Jobst* and those imposed in *Zablocki*,[162] and he found that

155. The cases relied on by the majority are all due process decisions with the exception of Griswold v. Connecticut, 381 U.S. 479 (1965), and Skinner v. Oklahoma, 316 U.S. 535 (1942), *discussed in* note 103 *supra*. Recent due process "right to privacy" decisions include Whalen v. Roe, 429 U.S. 589 (1977); Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 410 U.S. 113 (1973).

156. *See* notes 87-88 and accompanying text *supra*.

157. Although conceding that the statute "affects some people and does not affect others," 434 U.S. at 391 (Stewart, J., concurring), Justice Stewart maintained that the use of equal protection analysis was in reality an application of substantive due process. *Id.* at 395 (Stewart, J., concurring). There is undoubtedly a large measure of truth in his assertion. Whereas a finding of an equal protection violation usually requires the legislature to redraw its classifications, the holding in *Zablocki* entirely disabled the State from acting, characteristically the result of a due process violation. However, the complete invalidation of the statutory scheme may be due to the State's failure to include a severability clause. *See id.* at 401 n.2 (Powell, J., concurring); *see also id.* at 404 n.3 (Stevens, J., concurring).

158. *See* notes 103 & 155 *supra*.

159. 431 U.S. 494 (1977).

160. 434 U.S. at 407 (Rehnquist, J., dissenting). For a discussion of the rational basis standard of review, see note 6 *supra*.

161. 434 U.S. at 407 (Rehnquist, J., dissenting).

162. His characterization of the statute considered in *Jobst* as making marriage "practi-

the state had "an exceptionally strong interest in securing as much support as their parents [were] able to pay."[163] The same standard of review should therefore apply, he reasoned, and the Wisconsin act should be upheld.

The *Zablocki* opinion indicates what may be two important trends where the protection of individual choice in making important decisions about family life is at issue.[164] The Court in *Zablocki* has rather explicitly created a fundamental right to marry in the context of equal protection analysis, an expansion of the concept of "fundamental

cally impossible," *id.* at 408, was referred to by the majority as an "imaginative recasting of the case." *Id.* at 387 n.12.

163. *Id.* at 408 (Rehnquist, J., dissenting).

164. It should be noted that the elucidation of a right to marry as one of the interests the Court recognizes under the concept of "the interest in independence in making certain kinds of important decisions," Whalen v. Roe, 429 U.S. 589, 599-600 (1977) (footnote omitted), is apparently understood by the Court as strictly confined to the decision to enter into a traditional, two-party heterosexual marriage. All the cases cited in support of the proposition, and which support the contention that the family and matters relating to family life will receive judicial protection, were limited to cases involving the nuclear or extended natural family. Griswold v. Connecticut, 381 U.S. 479 (1965), for example, limited its holding specifically to the right of married couples to make their own decisions about contraception. And in Moore v. City of East Cleveland, 431 U.S. 494 (1977), the Court invalidated a zoning ordinance it perceived as "slicing deeply into the family itself," *id.* at 498, and thus invalid, while it upheld, in Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), an ordinance that defined single-family dwellings so as to permit any number of members of a natural family to live together in one house but limited the number of unrelated individuals who could do so to two. Further, in Quilloin v. Walcott, 434 U.S. 246 (1978), the Court unanimously recognized as firmly established that "freedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment," *id.* at 255 (quoting Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974)), but denied the natural father of an illegitimate child veto rights over his child's adoption, since the natural father at no time had, or sought, legal custody of the child. In addition, since the proposed adoption would not place the child with a set of parents with whom it had never before lived, the Court reasoned that giving full recognition to an already-existing "family unit" (the conventionally married mother and the prospective adoptive father) would serve the child's "best interests." 434 U.S. at 255. *See also* Smith v. Organization of Foster Families, 431 U.S. 816 (1977) (upheld procedures for removal of foster children from foster homes; the foster families did not have as intensely protectable an interest in "family matters" as had the natural family); Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd*, 425 U.S. 901 (1976) (summary affirmance of sodomy statute as not invading privacy interests of consensual homosexual adults); Wilkinson & White, *Constitutional Protection for Personal Lifestyles*, 62 CORNELL L. REV. 563 (1977).

The interest in freedom from state intrusion into the individual's decision to marry is not absolutely protected, particularly when Social Security legislation, or other complex federal or state public benefit legislation is involved. Judicial deference to legislation in those areas, as Califano v. Jobst, 434 U.S. 47 (1977) indicates, is significantly greater. *See also* Maher v. Roe, 432 U.S. 464 (1977) (refusal of Medicaid benefits for nontherapeutic abortions upheld, although Medicaid benefits given for childbirth); Poelker v. Doe, 432 U.S. 519 (1977) (no constitutional violation to publicly fund hospital services for childbirth but not to fund nontherapeutic abortions).

rights" that commentators had thought unlikely in the Burger Court.[165] Additionally, the analytical technique the Court used, while in substance the equivalent of strict judicial scrutiny requiring a compelling state interest, is couched in terms of "critical examination" that will be given legislative enactments when "rights of fundamental importance" are "significantly interfere[d] with."[166] The test the Court formulated is, "[w]hen a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests."[167] Employment of the revised "strict scru-

165. "Fundamental rights" analysis in terms of the equal protection guarantee originated with Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). It has been noted that use of fundamental rights in this context was the alternative the court selected after rejecting the natural law, substantive due process approach in Nebbia v. New York, 291 U.S. 502 (1934). The natural law concepts first espoused in Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798) have represented the shared belief of a majority of Justices of the Supreme Court that certain values are essential to individual liberty within our democratic structure of society, as was recently restated in Moore v. City of East Cleveland, 431 U.S. 494 (1977). *See also* Poe v. Ullman, 367 U.S. 497, 541-43, 550-54 (1961) (Harlan, J., dissenting); Palko v. Connecticut, 302 U.S. 319 (1937). After rejecting the substantive due process label because of the stigma attached to "Lochnerizing," the Court continued to afford special recognition to values it began with *Skinner* to term "fundamental." Professor Nowak delineated the "fundamental rights" deserving "strict" judicial scrutiny as: 1) the freedom of association implied by the First Amendment, Bates v. City of Little Rock, 361 U.S. 516, 522-23 (1960); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460-61 (1958); 2) the right to vote and participate in the electoral process, a prerequisite to the exercise of "liberty" under the due process clauses of the Fifth and Fourteenth Amendments, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Carrington v. Rash, 380 U.S. 89 (1965); 3) the right to travel freely among the states derived from several constitutional provisions, Shapiro v. Thompson, 394 U.S. 618 (1969); 4) rights accompanying the right to a hearing in the criminal process, including right to counsel under the Sixth Amendment, Mayer v. City of Chicago, 404 U.S. 189 (1971); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956); 5) rights of procedural fairness where individual claims against governmental deprivation of life, liberty or property are concerned, *see, e.g.*, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Vlandis v. Kline, 412 U.S. 441 (1973); Board of Regents v. Roth, 408 U.S. 564 (1972); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969); and 6) a fundamental right to privacy, Griswold v. Connecticut, 381 U.S. 479 (1965), which encompasses the rights to freedom of choice in marital decisions, Loving v. Virgnia, 388 U.S. 1, 12 (1967), the right of child bearing, Roe v. Wade, 410 U.S. 113, 152-53 (1973), and the right of child rearing, Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925). *See* J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 418-19 (1978).

The Burger Court has been noted for its desire to curb the expansion of additional areas of fundamental rights. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973); Dandridge v. Williams, 397 U.S. 471 (1970); W. LOCKHART, Y. KAMISAR & J. CHOPER, CONSTITUTIONAL LAW, 1534 *passim* (4th ed. 1975); Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977).

166. 434 U.S. at 383.

167. *Id.* at 388.

tiny" standard may indicate that the Court, while endeavoring to move away from the incongruity of constitutional standards inherent in the two-tiered approach to equal protection questions in which some statutes require merely a rational basis to be sustained while others must be supported by a compelling state interest, is not reverting to a rational basis test for all classifications, but is moving perhaps to a unified analysis on an intermediate ground that avoids the extremes of both the rational basis and strict scrutiny standards.[168]

C. Parental Rights of Unwed Fathers

Quilloin v. Walcott[169] is the third in the trio of decisions handed down during the past term that deals with freedom of personal choice in matters of family life.[170] A brief, unanimous opinion authored by Justice Marshall, *Quilloin* represents how restrictive the Court may be becoming in determining the rights of certain parents to determine how their children will be raised and to maintain for themselves a place in their children's lives even if they are not part of a traditional family unit. The Court's opinion is a strong indication that the familial rights previously enunciated by the Court[171] will be more narrowly circumscribed where the rights of unmarried, non-traditional parents or families are in issue. *Quilloin* held that in certain circumstances, a less

168. It has become accepted that the Burger Court has, in fact, at least since Reed v. Reed, 404 U.S. 71 (1971), employed an intermediate or sliding-scale standard of review. *See* Gunther, *The Supreme Court 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for A Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral and Permissive Classifications*, 62 GEORGETOWN L.J. 1071 (1974). Justice Marshall, the author of *Zablocki*, has repeatedly expressed his dissatisfaction with the rigid double-tiered dichotomy represented by the rational basis/strict scrutiny tests. *See, e.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 318-21 (1976) (Marshall, J., dissenting); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 98-110 (1973) (Marshall, J., dissenting); Dandridge v. Williams, 397 U.S. 471, 519-22 (1970) (Marshall, J., dissenting). Justice Powell, concurring in Craig v. Boren, 429 U.S. 190, 210-11 (1976) has also openly acknowledged the emergence of the "middle tier." Justice Stevens' concurrence in *Craig* also openly grappled with the problem of varying standards. Stevens would see the Court's standards as variations on one theme: "[W]hat has become known as the two-tiered analysis of equal protection claims does not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion." *Id.* at 212.

169. 434 U.S. 246 (1978).

170. *See also* Zablocki v. Redhail, 434 U.S. 374 (1978); Califano v. Jobst, 434 U.S. 47 (1977).

171. *See, e.g.*, Smith v. Organization of Foster Families, 431 U.S. 816 (1977) (procedures for removing a child from a foster home need not, consistent with due process, meet the standards applicable when a child is removed from its natural family). *See also* note 1 *supra*.

demanding standard, the "best interests of the child," may be applied in the case of unwed fathers in determining their parental rights. Married or divorced parents and unwed mothers, by contrast, cannot be separated from their children unless they are found "unfit."[172]

When Darrell Webster Quilloin was born in 1964, his parents were neither married nor living together. His father, Leon Quilloin, provided irregular support for him, gave him presents and occasionally visited him. In 1967, Darrell's mother married Ardell Walcott; Darrell lived with the Walcotts and their son, born a few years later. The litigation was precipitated when, in 1976, Walcott filed a petition for Darrell's adoption.[173] Quilloin objected to the proposed adoption, filed an application for a writ of habeas corpus for visitation rights, and petitioned for legitimation.[174] He also argued that the Georgia statutes giving sole parental control to Darrell's mother were unconstitutional because they denied him the rights granted to married parents.[175] Under Georgia law, the mother of an illegitimate child is the only recognized parent and may exercise all parental power.[176] Generally, no adoption of children is permitted without the express consent of both parents;[177] in the case of illegitimate children, however, the consent of the mother alone suffices.[178]

The trial court heard evidence relating to the child as well as to Quilloin's fitness as a parent. It determined that the proposed adoption and the denial of visitation rights and legitimation were in the best interests of the child. The court further held that since Quilloin had never legitimated Darrell, he lacked standing to object to the adoption.[179] On appeal to the Georgia Supreme Court,[180] Quilloin argued

172. *Cf.* Stanley v. Illinois, 405 U.S. 645 (1972).

173. 434 U.S. at 249-50.

174. *Id.* at 250.

175. *Id.* at 250.

176. GA. CODE ANN. § 74-203 (1973) provides: "The mother of an illegitimate child shall be entitled to the possession of the child, unless the father shall legitimate him as before provided. Being the only recognized parent, she may exercise all the paternal power."

177. GA. CODE ANN. § 74-403(1) (1975) provides: "Except as otherwise specified in the following subsections, no adoption shall be permitted except with the written consent of the living parents of a child. Said consent, when given freely, voluntarily, may not be revoked by the parents as a matter of right. In the case of a child 14 years of age, or over, the consent of such child also shall be required, and must be given in writing in the presence of the court."

178. GA. CODE ANN. § 74-403(3) (1975) provides: "Illegitimate children.—If the child be illegitimate, the consent of the mother alone shall suffice. Such consent, however, shall not be required if the mother has surrendered all of her rights to said child to a licensed child-placing agency, or to the Department of Human Resources."

179. 434 U.S. at 251.

180. Quilloin v. Walcott, 238 Ga. 230, 232 S.E.2d 246 (1977).

that the statutes operated to deny him equal protection and due process of law. He claimed that he was entitled to the same power to veto an adoption as is provided to married or divorced parents and to unwed mothers. Absent a finding that he had abandoned his child or was unfit, he contended that the adoption should not have been allowed without his consent.[181]

The Georgia Supreme Court held that classifications based on legitimacy are constitutional if based upon valid state interests.[182] The court emphasized the "public policy favoring marriage and the family," "the state's interest in promoting the family as an institution for child rearing" and the fact that, "[t]o further the protection and care of its children, Georgia favors and encourages marriage and child rearing in a family relationship."[183] It found placing full parental power in the mother alone to be consistent with these policies because the father could "choose to join" the family either by marrying the mother or by petitioning to legitimate the child.[184] The court found a true lack of interest in the child on Quilloin's part because he had failed to legitimate the child for eleven years.[185] In addition, the court held that a natural father's due process right to a fitness hearing before his child can be taken from his custody, established in *Stanley v. Illinois*,[186] did not apply in Quilloin's case because he was not a member of the family unit and the child's mother was still alive.[187] It therefore held that the

181. *Id.* at 231, 232 S.E.2d at 247.

182. *Id.* at 232, 232 S.E.2d at 248 (citing Labine v. Vincent, 401 U.S. 532 (1971)). *Labine* is all but explicitly overruled in light of Trimble v. Gordon, 430 U.S. 762 (1977). *See also* New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973); Gomez v. Perez, 409 U.S. 535 (1973); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972). Under this line of cases, classifications based on illegitimacy are virtually 'suspect.' *See also* Levy v. Louisiana, 391 U.S. 68 (1968). *But see* Fiallo v. Bell, 430 U.S. 787 (1977); Mathews v. Lucas, 427 U.S. 495 (1976).

183. *Id.* 238 Ga. at 232-33, 232 S.E.2d at 248.

184. *Id.* at 232, 232 S.E.2d at 248. The provision governing legitimation is GA. CODE ANN. § 74-103 (1973), which provides: "A father of an illegitimate child may render the same legitimate by petitioning the superior court of the county of his residence, setting forth the name, age, and sex of such child, and also the name of the mother; and if he desires the name changes, stating the new name, and praying the legitimation of such child. Of this application the mother, if alive, shall have notice. Upon such application, presented and filed, the court may pass an order declaring said child to be legitimate, and capable of inheriting from the father in the same manner as if born in lawful wedlock, and the name by which he or she shall be known."

185. 238 Ga. at 233, 232 S.E.2d at 248. This evidence was properly rejected by the Supreme Court since Quilloin testified that he was unaware of the possibility of legitimizing Darrell until he received notice of the adoption petition. *See* 434 U.S. at 254 n.14.

186. 405 U.S. 645 (1972).

187. 238 Ga. at 233-34, 232 S.E.2d at 248-49.

statute violated neither equal protection nor due process of law.[188]

Three justices of the Georgia court dissented. They interpreted the Supreme Court in *Stanley* as holding that an unwed father has due process rights and that he is denied equal protection when all other parents are granted a hearing on parental fitness and he is not.[189] In *Stanley*, an Illinois statute whereby the children of unmarried fathers were declared state wards and placed in guardianship upon the death of their mother without any hearing on parental fitness or proof of neglect by the natural father, although such hearing and proof were required when the state assumed custody of children of married or divorced parents and unmarried mothers, was challenged as a denial of due process and equal protection.[190] The *Stanley* Court noted that the due process clause protects the integrity of the family, and that such relationships are also recognized in families not legitimized by a marriage ceremony.[191] The unwed father's interest in retaining custody of his children was found "cognizable and substantial."[192] The Court concluded that it was violative of the equal protection clause to grant a hearing on parental qualifications to some but not all parents. There-

188. *Id.* at 234, 232 S.E.2d at 249.

189. *Id.* (Undercofler, P.J., joined by Gunter & Ingram, JJ., dissenting).

190. 405 U.S. at 646-47.

191. *Id.* at 651. The Court's language warrants repetition in this context, as the parallel between the types of interests asserted in *Stanley* and *Quilloin* are significant: "The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed 'essential,' Meyer v. Nebraska, 262 U.S. 390, 399 (1923), 'basic civil rights of man,' Skinner v. Oklahoma, 316 U.S. 535, 541 (1942), and '[r]ights far more precious . . . than property rights,' May v. Anderson, 345 U.S. 528, 533 (1953). 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' Prince v. Massachusetts, 321 U.S. 158, 166 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, Meyer v. Nebraska, *supra*, at 399, the Equal Protection Clause of the Fourteenth Amendment, Skinner v. Oklahoma, *supra*, at 541, and the Ninth Amendment, Griswold v. Connecticut, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring).

"Nor has the law refused to recognize those family relationships unlegitimized by a marriage ceremony. The Court has declared unconstitutional a state statute denying natural, but illegitimate, children a wrongful-death action for the death of their mother, emphasizing that such children cannot be denied the right of other children because familial bonds in such cases were often as warm, enduring, and important as those arising within a more formally organized family unit. Levy v. Louisiana, 391 U.S. 68, 71-72 (1968). 'To say that the test of equal protection should be the "legal" rather than the biological relationship is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of a State to draw such "legal" lines as it chooses.' Glona v. American Guarantee Co., 391 U.S. 73, 75-76 (1968).

"These authorities make it clear that, at the least, Stanley's interest in retaining custody of his children is cognizable and substantial." *Id.* at 651-52.

192. *Id.* at 652. *See* note 191 *supra*.

fore, all parents were entitled to a hearing on their fitness before their children were removed from their custody.[193]

The dissenters in the Georgia court recognized the state's interest in promoting legitimation of the children of unwed fathers. In light of *Stanley*, however, they found that an unmarried father could not be denied rights accorded all other parents when the adoption of his children is contemplated. Under the Georgia legislation, all other parents were required to give their consent before adoption could take place.[194] Consent was not necessary if the child had been abandoned, if the parent was insane or otherwise incapable of giving consent, or where the parent had previously surrendered all of his or her rights to the child.[195] A finding of abandonment or wilful non-support was not required to terminate the right of consent to adoption in the case of unwed fathers, however;[196] in the case of illegitimate children, the consent of the mother alone was sufficient.[197] Because the adoption provisions denied Quilloin the same rights concerning his child accorded other parents, the dissent would hold that they violated due process and equal protection.[198] The dissenters agreed with the majority that the statute placing all parental authority in the mother was a constitutionally permissible ordering of family relationships, and that they would uphold that provision.[199]

On appeal, the Supreme Court framed the issue before it as "whether, in the circumstances of this case and in light of the authority granted by Georgia law to married fathers, [Quilloin's] interests were adequately protected by a 'best interests of the child' standard" in the hearing before the trial court at which he was denied legitimation and visitation rights.[200] The court initially dismissed the finding that Quilloin had never petitioned for legitimation prior to his notice of the adoption proceedings as the court found that he was not aware of the existence of the legitimation procedure prior to the filing of the adoption petition.[201] The Court acknowledged that "the relationship be-

193. *Id.* at 658.

194. GA. CODE ANN. § 74-403(1) (1975). *See* note 177 *supra.*

195. GA. CODE ANN. § 74-403(2) (1975).

196. GA. CODE ANN. § 74-403(3) (1975). *See* note 178 *supra.*

197. *Id.*

198. 238 Ga. at 235-36, 232 S.E.2d at 249-50 (Undercofler, P.J., joined by Gunter & Ingram, JJ., dissenting).

199. *Id.* at 236-37, 232 S.E.2d at 250.

200. 434 U.S. at 254. Quilloin's claim that the gender-based distinctions implicit in the statutes violated the equal protection clause was not presented in his jurisdictional statement, so although the point was briefed, it was not considered by the Court. *Id.* at 253 n.13.

201. *Id.* at 254.

tween parent and child is constitutionally protected"[202] and that " 'freedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.' "[203] But Quilloin had never sought either actual or legal custody of the child, and the result of the adoption in this case would be to recognize an existing family unit.[204] These factors provided a basis for distinguishing *Stanley v. Illinois*. In *Stanley*, the father had lived with the mother and their children during most of eighteen years, and the effect of the Illinois statute was to place his children with total strangers. It was consequently held in *Stanley* that the father had the same right as other parents to a fitness hearing before his children could be made wards of the state.[205] Since Quilloin had not shown the same level of commitment to or interest in his child, *Stanley* was implicitly found inapposite.

The *Quilloin* opinion also noted the observation made last term in *Smith v. Organization of Foster Families*[206] that the due process clause

202. *Id.* at 255. The Court cited Wisconsin v. Yoder, 406 U.S. 205 (1972), where it was held that compulsory education after eighth grade impinges upon the fundamental right to free exercise of religion guaranteed by the First Amendment and the traditional interest of parents with respect to the religious upbringing of their children. The right of parents to rear their children was recognized as part of a "strong tradition" founded on "the history and culture of western civilization," and it was stated that the parental role "is now established beyond debate as an enduring American tradition." 406 U.S. at 232. The Court also cited Stanley v. Illinois, 405 U.S. 645 (1972), and Meyer v. Nebraska, 262 U.S. 390 (1923) (statute prohibiting teaching of foreign language to children in the eighth grade or below constituted deprivation of liberty in violation of the due process clause of the Fourteenth Amendment). "Liberty" encompasses the right of the individual to "establish a home and bring up children." *Id.* at 399. *See* Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

203. 434 U.S. at 255, quoting Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974) (overly restrictive maternity leave provision penalized pregnant teachers for deciding to bear a child; conclusive presumption of unfitness for teaching five months before the expected childbirth violates due process clause of the Fourteenth Amendment).

204. 434 U.S. at 255.

205. 405 U.S. at 658. *See* note 191 *supra.*

206. 431 U.S. 816 (1977). *Foster Families* provides strong support for the proposition that the traditional, natural family will be given greater protection in equal protection challenges than any other family-type structure. That opinion, authored by Justice Brennan, was joined by five Justices, with three Justices concurring in the judgment.

Foster Families involved a due process challenge to New York's procedures for transferring children from foster homes. The lower court held that before a child may be peremptorily transferred, either to another foster family or to the natural parents, it is entitled to a hearing at which all concerned parties may present relevant information. The foster parents argued that they possessed a "liberty interest" in the psychological ties that develop among foster family members.

The Court's discussion of the elements that define the concept of "family" shows that the Court considers biological relationships and the marital relationship the basic boundaries of the "family" concept: "[T]he usual understanding of 'family' implies biological relationships, and most decisions treating the relationship between parent and child have

would be offended "[i]f a state were to attempt to force the breakup of a *natural family*, over the objections of the parents and their children, *without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest*."[207] The Court apparently viewed Quilloin's rights as more closely akin to those of the foster parents in *Foster Families* than those of the natural parents in that case. *Foster Families* found that when the interests of foster parents in a child are compared with those of its natural parents, the natural parent's interests are substantially stronger and thus subject to greater procedural safeguards. Thus, the unfitness standard had to be met in the case of removing a child from its natural parents, but was not required before a child could be removed from a foster home. Similarly, Quilloin could be divested of his rights in his child without a showing that he was unfit as a parent.

Quilloin's rights as Darrell's natural father were not accorded the same weight as those of the established family unit with which Darrell had been living, that unit consisting of Darrell's natural mother, her husband, and their child. The reason the Court gave as to why Quilloin could be denied his legitimation petition and visiting rights, even though he had always maintained contact with his son, was that he had never had actual custody of the child, and that the result of the adoption would be to recognize an existing family unit. Because of these factors, the Court reasoned that as a matter of due process, deprivation of Quilloin's rights in his son could properly be based on a "best interests of the child" standard, rather than upon a showing that Quilloin was unfit as a parent.[208]

stressed this element." *Id.* at 843. Although acknowledging that biological relationships are not the exclusive determinant of the existence of a family, the Court noted that there are important distinctions between foster and natural families and held that there was only "the most limited constitutional liberty interest in a foster family." *Id.* at 843-46.

207. *Id.* at 862-63 (Stewart, J., concurring) (emphasis added).

208. 434 U.S. at 255. The arguments of the *Foster Family* decision to the effect that natural parents' rights in their children are stronger than those of foster parents seems uncontrovertible when the two are compared, particularly where there is no showing of parental unfitness. The focus on the traditional family is, however, unfortunate because the privacy and child-rearing interests recognized by *Foster Families* and other cases are not likely to be extended to the interests involved in nontraditional types of family living, and even less so to the single parent families, or families with more than one single parent and child.

Moore v. City of East Cleveland, 431 U.S. 494 (1977), another decision handed down last term, is even more restrictive in its concept of family. *Moore* held unconstitutional a zoning ordinance making it a criminal offense for more than a "single family" to live within a specified area. "Family" was defined narrowly, allowing only certain blood-related family members to live together. Mrs. Moore was fined and sentenced to jail because her son and two grandsons lived with her, in violation of the ordinance. The Court found that East

The Court also held that Quilloin was not denied equal protection even though his authority to veto an adoption was not measured by the same standard as applied to a married father. Quilloin's interests, the opinion noted, were "readily distinguishable" from those of a separated or divorced father.[209] Although subject to essentially the same support obligations as a married father, the Court emphasized that Quilloin "has never exercised actual or legal custody over his child, and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child."[210] The distinguishing characteristic between married and unmarried fathers justifying this disparity in treatment was "legal custody of children," which the Court found to be "a central aspect of the marital relationship."[211] In contrast to Quilloin, a divorced father would have borne, at least theoretically, full responsibility for the rearing of his children during the course of the marriage. Given this "difference in the extent of commitment to the welfare of the child," the Court held that "the State could permissibly give [Quilloin] less veto authority than it provides to

Cleveland's regulations sliced deeply into the family itself. Because of the interest in personal choices concerning family living arrangements, the statute was held violative of the due process clause of the Fourteenth Amendment. In substantiating the Court's application of a substantive due process rationale in overturning the statute, Justice Powell stated: "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." *Id.* at 503-04 (footnotes omitted). *See also* Poe v. Ullman, 367 U.S. 497, 542-43 (1961) (Harlan, J., dissenting). The decision also noted that the proper limits on substantive due process may come from " 'respect for the teachings of history [and] solid recognition of the basic values that underlie our society.' " 431 U.S. at 503 (Harlan, J., concurring) (quoting Griswold v. Connecticut, 381 U.S. 479, 501 (1965) (footnote omitted)).

Thus, individual liberties are restricted by whether they are "deeply rooted . . . in tradition." Depending on one's point of view, these "traditions" may also encompass the concept that women should stay in the home, that consensual homosexual acts are criminal, or indeed that sexual activity outside of the marriage relation is criminal. Problematically, the teachings of history may not necessarily provide a reliable guide for constitutional litigation in the context of modern society. It may be precisely those nontraditional, nonconforming types of expression and lifestyles which are in most need of protection under the equal protection and due process "liberty" guarantees.

209. 434 U.S. at 256.

210. *Id.*

211. *Id.* It should be noted that the Court does not delve into what standard of review would be applicable to classifications discriminating on the basis of marital status. The Court merely notes at the close of its opinion that, "the State was not foreclosed from recognizing th[e] difference in the extent of commitment to the welfare of the child." *Id.* According to this reasoning, the parents of illegitimate children apparently may be required to prove a certain degree of participation in their children's upbringing before they will be accorded the same rights as natural parents. This tendency indicates a withdrawal from the Court's more liberal stance in Stanley v. Illinois, 405 U.S. 645 (1972). *See* note 191 *supra.*

a married father."[212]

The Court thus held the extent of pecuniary support for and involvement with the child to be determinative of the quantum of parental rights afforded an unwed father. What is particularly notable is the Court's emphasis on custody of the child, since legal custody may not be a viable alternative for impoverished fathers or for fathers who must spend a large portion of the day working and therefore away from their children. The Court assumed, as had the Georgia Supreme Court, that legitimation or custody were possible alternatives for Quilloin. The Georgia Court indicated that Quilloin could have joined in the family either by marrying Darrell's mother or by legitimating Darrell.[213] It is questionable whether parental rights should be dependent upon the marital status of the parents. For any number of reasons, the failure to marry may not have been a matter of Quilloin's personal choice. Furthermore, Quilloin's option of legitimating Darrell was not unilateral or absolute, since Darrell's mother had a right to object to the proposed legitimation.[214] In fact, during the legitimation proceeding held in the trial court, it was determined that it was in Darrell's best interest that his father not legitimate him.[215] Without legitimation, Quilloin was precluded from vetoing his child's adoption.

The reasons for Quilloin's failure to exercise custody were similarly not examined by the Court, except to note that Quilloin had not sought it. This fact was held sufficient not only to preclude Quilloin from determining whether or not his son would be adopted, but also from legitimating his son and from acquiring any rights to visit him in the future. The rights of an unmarried father in regard to his children, then, appear sharply limited by the extent of his relationship with their mother, because whether he married or lived with her reflects at least in part the extent of his relationship with his children. Other factors reflecting on that relationship include whether he was able to support them financially or to secure their custody.

This unanimous decision held that different criteria may constitutionally be applied, under any standard of review,[216] to the rights of fathers in regard to their children, depending upon whether or not they are unwed. By clearly giving greater weight to the "family interests" of established, traditionally married family units, the Court gave a strong

212. 434 U.S. at 256.
213. 238 Ga. at 232, 232 S.E.2d at 248.
214. *See* note 184 *supra.*
215. *See* 434 U.S. at 251.
216. *Id.* at 256.

indication in *Quilloin* that its avowal of freedom of personal choice in matters of family life will be limited to a narrow concept of family, one encompassing only the heretofore legally recognized marital unit.

II. Classifications Based on Alienage

A. Foley v. Connelie

Chief Justice Burger, joined by a clear majority of the Court,[217] authored *Foley v. Connelie*,[218] a decision which signals an abrupt *volte face* concerning the extent of protection the Court will accord aliens under the equal protection clause. Alienage was explicitly added to the narrow category of suspect classes only seven years ago in *Graham v. Richardson*,[219] and has been subjected to varying degrees of scrutiny when used as the basis of federal or state statutory classifications.[220]

217. The Chief Justice was joined by Justices Stewart, White, Powell and Rehnquist. Justice Blackmun concurred in the result. Justice Marshall dissented, joined by Justices Brennan and Stevens. Justice Stevens was joined in a separate dissent by Justice Brennan.

218. 435 U.S. 291 (1978).

219. 403 U.S. 365 (1971). *Graham* held that a state may not condition receipt of welfare benefits on possession of U.S. citizenship, or impose a 15 year residency requirement on noncitizens. The Court held, "[C]lassifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a 'discrete and insular' minority . . . for whom such heightened judicial solicitude is appropriate." 403 U.S. at 372 (quoting United States v. Carolene Prod. Co., 304 U.S. 144, 152 n.4 (1938)) (footnotes omitted). The judgment was almost unanimous, as eight Justices joined in Justice Blackmun's majority opinion and Justice Harlan joined in it in part. Subsequent to *Graham*, the Supreme Court has relied on that decision and reiterated that strict scrutiny is applicable in cases involving state statutory classifications based on alienage. *See* Nyquist v. Mauclet, 432 U.S. 1, 7 (1977) (Burger, C.J., Powell, Stewart & Rehnquist, JJ., dissenting) (state statute excluding aliens from state educational grants struck down in 5-4 decision); Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 602 (1976) (Rehnquist, J., dissenting in part, Stevens, J., abstaining) (Puerto Rican statute excluding aliens from private practice of civil engineering struck down in a 7-1 decision); *In re* Griffiths, 413 U.S. 717, 721-22 (1973) (Burger, C.J., & Rehnquist, J., dissenting) (state court rule prohibiting aliens from private practice of law struck down in a 7-2 decision); Sugarman v. Dougall, 413 U.S. 634, 642 (1973) (Rehnquist, J., dissenting) (state law excluding aliens from all competitive civil service positions struck down in an 8-1 decision).

220. State action excluding aliens from a broad range of public employment, *see* Sugarman v. Dougall, 413 U.S. 634 (1973), or from "common occupations of the community," *see* Examining Bd. of Eng'rs, v. Flores de Otero, 426 U.S. 572 (1976); *In re* Griffiths, 413 U.S. 717 (1973), and state statutes withholding public benefits from aliens, *see* Nyquist v. Mauclet, 432 U.S. 1 (1977); Graham v. Richardson, 403 U.S. 365 (1971), have been examined under strict judicial scrutiny and found to violate the equal protection guarantee. *See also* note 219 *supra*. Federal laws discriminating against aliens are subject to more relaxed standards of review under the due process clause of the Fifth Amendment, however, due to Congress' plenary power over immigration and naturalization, its power over foreign commerce, and its war power. *See* Nyquist v. Mauclet, 432 U.S. 1, 7, 8 n.8 (1977); Hampton

Connelie established a broadly defined exception to the virtual hornbook-law rule that state classifications based on alienage are subject to strict scrutiny.[221] The Court reasoned that " 'a State's historical power to exclude aliens from participation in its democratic political institutions' " is part of its obligation " 'to preserve the basic conception of a political community.' "[222] As regards matters that are " 'firmly within a State's constitutional prerogatives' "[223] in this respect, *Connelie* held that "[t]he State need only justify its classification by a showing of some rational relationship between the interest sought to be protected and the limiting classification."[224] Under this deferential standard of review, the state of New York was permitted to exclude aliens from its police force.

Edmund Foley, a citizen of Ireland, was a permanent resident alien, eligible to become a naturalized citizen upon fulfilling the five year residency period required as a prerequisite to applying for citizenship,[225] when he sought appointment as a New York state troop-

v. Mow Sun Wong, 426 U.S. 88, 100-01 (1976); Mathews v. Diaz, 426 U.S. 67, 84-87 (1976); De Canas v. Bica, 424 U.S. 351, 358 n.6 (1976). This bifurcated approach to equal protection analysis of alienage classifications has been noted by commentators to be indicative of the sliding scale standard of review the Court actually employs, without acknowledgement, in equal protection analysis. Although alienage has been accepted as a "suspect" classification, differing standards of review are employed depending on whether the action is taken by state or federal government. This lack of clarity contributes to uncertainty as to what types of discrimination against aliens are constitutionally permissible. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 592-601 (1978); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1052-56 (1978); K. Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C.L. REV. 541 (1977).

221. *See* Foley v. Connelie, 419 F. Supp. 889, 899 (S.D.N.Y. 1976) (Mansfield, C.J., dissenting), *aff'd*, 435 U.S. 291 (1978).

222. 435 U.S. at 295-96 (quoting Sugarman v. Dougall, 413 U.S. 634, 647, 648 (1973)).

223. 435 U.S. at 296 (quoting Sugarman v. Dougall, 413 U.S. 634, 648 (1973)).

224. 435 U.S. at 296.

225. *See* 5 HASTINGS CONST. L.Q., 131 n.345 (1978). Aliens can file a petition for naturalization only after residing in this country for five years, 8 U.S.C. § 1427(a) (1976), or three years if married to an American citizen, 8 U.S.C. § 1430(a) (1976). The naturalization laws have created certain exceptions to this durational requirement where the alien is (1) married to a citizen employed abroad by the government, by a United States institution of research or as a missionary, and is present in the country at the time of naturalization and declares an intention to reside in the country as soon as his or her spouse terminates such foreign employment; (2) employed for at least five years by a nonprofit corporation recognized by the United States Attorney General as one that promotes United States interests abroad; or (3) is the surviving spouse of a citizen killed during a period of honorable service in the armed forces and who was living in "marital union" with the citizen spouse at the time of death. 8 U.S.C. §§ 1430(b)-(d) (1970). Justice Rehnquist, dissenting in Nyquist v. Mauclet, 432 U.S. 1 (1977), pointed out that these exceptions are de minimus, *id.* at 18 n.1 (Rehnquist, J., dissenting), and went on to state the rationale behind holding certain classifications of aliens "suspect": "If a classification . . . places aliens in one category, and citizens in another, then, thereafter, every entering resident alien must pass through a period of time in this

er.[226] He was not permitted to take the qualifying competitive examination, however, pursuant to a New York statute under which only United States citizens may be appointed to the state police force.[227] Eligibility for beginning positions was further limited to those between 21 and 29 years of age.[228] By the time he could become naturalized, Foley would be too old to apply for a trooper position.[229] He therefore brought a class action seeking a declaration that the New York law was unconstitutional under the equal protection clause insofar as it excluded aliens from employment, and for an injunction restraining its enforcement.[230] A three-judge district court granted summary judgment for the defendants, upholding the statute's validity.

The lower court evaluated recent Supreme Court decisions relating to employment prohibitions against aliens,[231] and determined that the strict scrutiny, compelling state interest test applied to cases involving the "discrete and insular minority" of aliens.[232] The court found, however, that an exception to this rule was articulated in *Sugarman v. Dougall*,[233] the Supreme Court decision invalidating New York's total exclusion of aliens from its competitive civil service positions. Under *Sugarman*, a state has an historic obligation " 'to preserve the basic conception of a political community.' "[234] To accomplish this goal, a state has the power to prescribe the qualifications of its officers and voters. This power, the *Sugarman* Court found, applies "also to persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform func-

country during which he falls into the one category and not the other. Nothing except time can remove him from his identified status as an 'alien' and from whatever associated disabilities the statute might place on one occupying that status. In this sense, it is possible to view aliens as a discrete and insular minority, since they are categorized by a factor beyond their control." *Id.* at 18-19.

Justice Rehnquist's rationale is especially appealing when applied to Foley's case, although the Court did not elaborate on this point. Due to the age restrictions, *see* note 229 and accompanying text *infra*, Foley was wholly precluded from attaining a position as a police officer, even though he would, after the mandatory waiting period, become a citizen.

226. 435 U.S. at 292.

227. N.Y. EXEC. LAW § 215(3) (McKinney 1972): "No person shall be appointed to the New York State police force unless he shall be a citizen of the United States."

228. *Id.*

229. Foley v. Connelie, 419 F. Supp. at 900 n.1.

230. *Id.* at 890.

231. Examining Bd. of Eng'rs v. Flores de Otero, 426 U.S. 572 (1976); *In re* Griffiths, 413 U.S. 717 (1973); Sugarman v. Dougall, 413 U.S. 634 (1973).

232. 419 F. Supp. at 894.

233. 413 U.S. 634 (1973).

234. *Id.* at 647 (citing Dunn v. Blumstein, 405 U.S. 330, 344 (1972)).

tions that go to the heart of representative government."[235] Such state action, while "not wholly immune from scrutiny under the Equal Protection Clause"[236] will be subjected to less demanding scrutiny:

> This Court has never held that aliens have a constitutional right to vote or to hold high public office under the Equal Protection Clause. . . . A restriction on the employment of noncitizens, narrowly confined, could have particular relevance to this important state responsibility, for alienage itself is a factor that reasonably could be employed in defining "political community."[237]

From its reading of *Sugarman*, the lower court concluded that "[t]he classification of alienage, suspect for some purposes, may be permissible when the state is dealing with democratic government and its participants."[238] Applying this standard, the court found that the state trooper's job is a "delicate nonelective executive . . . position" and that it "entails participation in state government."[239] It is therefore "not included in the class of 'common occupations of the community' to which the shelter of the equal protection clause has been held to extend for the benefit of aliens."[240] Foley's exclusion from the state police force was therefore held constitutionally permissible.[241] In the alternative, the district court found that even under strict scrutiny, the statute would withstand constitutional challenge because the state had asserted a compelling state interest in "the maintenance of public order to effect the preservation of the political structure."[242] Viewing aliens as existing in a "limbo of loyalty" for at least five years while they retain their foreign citizenship,[243] the court would have upheld the exclusion of aliens from the police force under any standard of review.

The Supreme Court agreed with the lower court's analysis, except that the majority did not find it necessary to go so far as to apply strict scrutiny to the classification in question. Rather, the Court elevated the *Sugarman* exception, which had been dicta and had been characterized

235. *Id.*
236. *Id.* at 648.
237. *Id.* at 648-49.
238. 419 F. Supp. at 895 (citing Sugarman v. Dougall, 413 U.S. 634, 647 (1973)).
239. *Id.*
240. *Id.* (quoting Sugarman v. Dougall, 413 U.S. 634, 641 (1973)).
241. The court stated, "We believe that the state has a special interest in the composition of its police force which justifies exempting it from the class of ordinary occupations from which aliens cannot be excluded," 419 F. Supp. at 895, and concluded, "This is a situation where citizenship bears a vital and essential relationship to the proper performance of the duties of a state trooper." *Id.*
242. *Id.* at 898. *See id.* at 896-98.
243. *Id.* at 898.

as a narrow exception last term in *Nyquist v. Mauclet*,[244] into a fully mature decisional rule in equal protection jurisprudence relating to alienage classifications.

The bulk of the concise majority opinion developed the Court's rationale that the police function is "one of the basic functions of government,"[245] equating the broad discretionary powers of police officers with the duties of jurors and judicial officers.[246] The duties of the latter encompass the power to judge citizens, a power which only citizens may themselves exercise. By analogy, the Court found it fitting that only citizens be vested with the "almost infinite variety of discretionary powers"[247] ranging from invasion of privacy in public places to making an arrest without a warrant.

Chief Justice Burger's opinion provided an interpretation of the decisions relating to aliens since *Graham*. He was careful to point out that although "the Court ha[d] treated certain restrictions on aliens with 'heightened judicial solicitude,' "[248] the Court had "never suggested that such legislation is inherently invalid, nor . . . held that all limitations on aliens are suspect."[249] The Chief Justice characterized

244. 432 U.S. 1 (1977). In *Nyquist*, the Court discussed the parameters of the *Sugarman* exception and found it exceedingly limited: "[A]s *Sugarman* makes quite clear, the Court had in mind a State's historical and constitutional powers to define the qualifications of voters, or of 'elective or important nonelective' officials 'who participate directly in the formulation, execution, or review of broad public policy.' " *Id.* at 11 (quoting Sugarman v. Dougall, 413 U.S. 634, 647 (1973)). The *Nyquist* Court went on to state, "*In re Griffiths*, decided the same day, reflects the narrowness of the exception. In that case, despite a recognition of the vital public and political role of attorneys, the Court found invalid a state-court rule limiting the practice of law to citizens." 432 U.S. at 11. This view of the *Sugarman* exception, expressed only last term in *Nyquist*, and the view implicit in *Connelie* are sharply at variance. That *Nyquist* represented a bare majority opinion and that *Connelie* was supported by six members of the Court indicates a trend to expand, rather than curtail, the *Sugarman* exception.

245. Foley v. Connelie, 435 U.S. at 297.

246. *Id.* at 299. The States may constitutionally exclude aliens from voting. *See* Sugarman v. Dougall, 413 U.S. 634, 647 (1973); Dunn v. Blumstein, 405 U.S. 330, 344 (1972). States also have the power to prescribe the manner of selection and qualifications of its officers. *See* Sugarman v. Dougall, 413 U.S. 634 (1973); Boyd v. Nebraska *ex rel.* Thayer, 143 U.S. 135, 161 (1892). The *Connelie* reasoning supports the proposition, as yet not explicitly relied upon by the Court, that aliens may also be excluded from jury service. *See* 435 U.S. at 296; Perkins v. Smith, 370 F. Supp. 134 (D. Md. 1974), *aff'd*, 426 U.S. 913 (1976) (exclusion of aliens from grand and petit jury panels in state and federal courts does not deny resident alien equal protection).

247. 435 U.S. at 297.

248. *Id.* at 294 (quoting Graham v. Richardson, 403 U.S. 365, 372 (1971)).

249. 435 U.S. at 294. In one sense, the Court is correct, as the compelling state interest test has never meant automatic invalidation of laws, even in those cases involving racial classifications. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944). However, cases dealing with State exclusions of aliens have consistently stated that classifications involving

those state statutes that have been struck down, such as those excluding aliens from educational benefits,[250] public employment,[251] or licensed professions,[252] as striking "at the noncitizen's ability to exist in the community, a position seemingly inconsistent with the Congressional determination to admit the alien to permanent residence."[253] He concluded that "[t]he essence of our holdings to date is that although we extend to aliens the right to education and public welfare, along with the ability to earn a livelihood and engage in licensed professions, the right to govern is reserved to citizens."[254]

Chief Justice Burger was concerned that subjecting all statutory exclusions of aliens to strict scrutiny would " 'obliterate all the distinctions between citizens and aliens, and thus depreciate the historic values of citizenship.' "[255] Citing *Sugarman*, he noted the " 'State's

alienage are suspect. *See* Nyquist v. Mauclet, 432 U.S. 1, 7 (1977); Examining Bd. of Eng'rs v. Flores de Otero, 426 U.S. 572, 602 (1976); Sugarman v. Dougall, 413 U.S. 634, 642 (1973); Graham v. Richardson, 403 U.S. 365, 371-72 (1971).

250. Nyquist v. Mauclet, 432 U.S. 1 (1977). It should be noted that in *Connelie* the Chief Justice was evaluating the importance of educational benefits to the ability of aliens to survive as permanent residents in a manner inconsistent with the views in this regard set forth in his dissenting opinion in *Nyquist*. In that case, he distinguished all previous decisions striking down state classifications based on alienage as involving the denial of essential means of economic survival. *See id.* at 12-14 (Burger, C.J., dissenting). He stated that he would not treat educational benefits as essential to survival. *Id.* at 13.

In his dissenting opinion in *Nyquist*, the Chief Justice suggested a method of determining the constitutionality of various discriminations against aliens. He would allow exclusion of aliens if a "*fundamental* personal interest is not at stake." *Id.* at 14 (emphasis in the original). But if alienage is truly a "suspect classification," an additional inquiry as to whether a "fundamental interest" is involved, as a prerequisite to invoking strict scrutiny, is redundant. Such a requirement would strip the concept of suspect classifications of its meaning. This view was not advanced by the majority in *Connelie*.

251. Sugarman v. Dougall, 413 U.S. 634 (1973). The exclusion of aliens from private employment was struck down in the early case of Truax v. Raich, 239 U.S. 33 (1915). The observation of the Court there bears repeating: "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure. . . . If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words." *Id.* at 41 (citations omitted). The *Connelie* majority stressed that the office of a policeman is not one of the "common occupations of the community" referred to in *Truax*. 435 U.S. at 298.

252. Examining Bd. of Eng'rs v. Flores de Otero, 426 U.S. 572 (1976) (exclusion of all non-citizens from practice of civil engineering in Puerto Rico held unconstitutional); *In re* Griffiths, 413 U.S. 717 (1973) (exclusion of all permanent resident aliens from the practice of law held a denial of equal protection).

253. 435 U.S. at 295.

254. *Id.* at 297.

255. *Id.* at 295 (Burger, C.J., dissenting) (quoting Nyquist v. Mauclet, 432 U.S. 1, 14 (1977)).

historical power to exclude aliens from participation in its democratic political institutions' " as part of the sovereign's obligation " 'to preserve the basic conception of a political community.' "[256] The essence of citizenship is the entitlement to participate in the processes of democratic decisionmaking. The Court found it clear that a state may deny aliens the right to vote or to run for elective office, for these rights "lie at the heart of our political institutions."[257] The majority opinion also indicated that aliens may be excluded from jury service, for similar reasons.[258] Finally, the Court noted that "citizenship may be a relevant qualification for fulfilling those 'important nonelective executive, legislative and judicial positions,' held by 'officers who participate directly in the formulation, execution, or review of broad public policy.' "[259] The police officer was held to occupy such a position, justifying the exclusion of aliens from New York's police force.[260]

Connelie thus established a new "test" for alienage classifications. The "practical consequence" of the theory that the state must preserve its political community, the Court held, is that " 'our scrutiny will not be so demanding where we deal with matters firmly within a state's constitutional prerogatives.' . . . The state need only justify its classification by a showing of some rational relationship between the interest sought to be protected and the limiting classification."[261] *Connelie* posits an essentially open-ended, ad hoc test to determine whether a state is acting within its constitutional prerogatives: "[W]e must necessarily examine each position in question to determine whether it involves discretionary decisionmaking, or execution of policy, which substantially affects members of the political community."[262] The majority had no difficulty in classifying the exercise of police authority as calling for a high degree of judgment and discretion, the abuse of which could have a serious impact on individuals.[263] The test as formulated, however, could also be applied to a wide number of positions in both the private and public sectors that "substantially affect" citizens. The Court's new test subtly, but importantly, differs from

256. 435 U.S. at 295-96 (quoting Sugarman v. Dougall, 413 U.S. 634, 647, 648 (1973)).

257. 435 U.S. at 296. *See* note 246 *supra.*

258. *Id. See* note 246 *supra.*

259. 435 U.S. at 300 (quoting Sugarman v. Dougall, 413 U.S. 634, 647 (1973)).

260. 435 U.S. at 300. The Court stated, "In the enforcement and execution of the laws the police function is one where citizenship bears a rational relationship to the special demands of the particular position." *Id.*

261. *Id.* at 296 (quoting Sugarman v. Dougall, 413 U.S. 634, 648 (1973)).

262. 435 U.S. at 296 (footnote omitted).

263. *Id.* at 297-98. The Court emphasized the discretionary power of an arresting officer without a warrant to curtail citizens' liberty and to invade their privacy. *Id.*

Sugarman's initial formulation. The Court would now permit the exclusion of aliens from any position involving "discretionary decision-making or execution of policy."

Justice Marshall's dissenting opinion[264] emphasized the narrowness of the *Sugarman* exception relied upon by the majority and the fact that it was so characterized only last term in *Nyquist v. Mauclet*.[265] In his view, the phrase "execution of broad public policy" applies only to those persons having "responsibility for actually setting government policy pursuant to a delegation of substantial authority from the legislature."[266] The majority's reading of *Sugarman* would permit the exception to swallow the rule. Justice Marshall found a substantial difference between "the formulation and execution of broad public policy and the application of that policy to specific factual settings."[267] The policy judgments that govern police officers' conduct are not formulated by the officers themselves; rather, they are contained in the federal and state constitutions, statutes and regulations.[268] The law enforcement responsibilities of a state trooper do not make him a formulator of government policy any more than the practice of law makes an attorney a judicial officer equivalent to a judge.[269] Since no compelling interest had been proffered by the state, Justice Marshall would hold the state's exclusion of aliens from state trooper positions a violation of the equal protection clause.[270]

Justice Stevens' dissent[271] attempted to divine the assumptions the state was making about aliens as a class. In his view, the validity of the wholesale exclusion of aliens from this government service required a satisfactory answer to the question, "What is the group characteristic that justifies the unfavorable treatment of an otherwise qualified individual simply because he is an alien?"[272] Finding that the disqualify-

264. 435 U.S. at 302-07 (Marshall, J., dissenting).

265. 432 U.S. 1 (1977), *discussed in* note 244 *supra*.

266. 435 U.S. at 304 (Marshall, J., dissenting).

267. *Id.*

268. *Id.*

269. *Id.* at 306. Justice Marshall was referring to *In re* Griffiths, 413 U.S. 717 (1973). In that case, the justification offered by the State of Connecticut for its exclusion of permanent resident aliens from the bar, that attorneys are "officers" of the court and must therefore be citizens, was rejected in a 7-2 decision.

270. 435 U.S. at 306-07.

271. 435 U.S. at 307-12. (Stevens, J., dissenting).

272. *Id.* at 308. Justice Stevens' approach in his dissenting opinion should be compared to the reasoning applied by the Court in a line of cases dealing with gender-based classifications. In Craig v. Boren, 429 U.S. 190 (1976), Justice Brennan noted that statutes "employing gender as an inaccurate proxy for other, more germane bases of classification" had been invalidated. *Id.* at 198. *See* Weinberger v. Wiesenfeld, 420 U.S. 636, 643 (1975); Schles-

ing characteristic implicit in the statute was aliens' foreign allegiance, suggesting a lack of trustworthiness or loyalty, Justice Stevens concluded, "[u]nless the Court repudiates its holding in *In re Griffiths*, . . . it must reject any conclusive presumption that aliens, as a class, are disloyal or untrustworthy."[273]

Justice Stevens also criticized the exception to the rule of strict scrutiny formulated by the majority. The line between policymaking and nonpolicymaking positions should be drawn "in as consistent and intelligible a fashion as possible."[274] He noted two areas where police officers are categorized differently than their superiors. In the context of immunity from liability, a police officer is judged by a good faith and probable cause standard, while the decisions of officers of the executive branch are judged by a more complex standard.[275] And in the political patronage context, the Court has held that most public employees are protected from discharge because of their political beliefs, but that when an administration changes certain policymaking officials may constitutionally be removed based on their political affiliation.[276] Justice Stevens argued that under either concept, a state trooper would not be deemed a high-ranking, policymaking official. He found it "inexplicable" that the trooper was so characterized when the issue was "whether persons may be excluded from all positions in the police force simply because they are aliens."[277]

Justice Stevens' last point was particularly insightful. He strongly disagreed with the majority's "unarticulated premise that the police function is at 'the heart of representative government' and therefore all persons employed by the institutions performing that function 'participate directly in the formulation, execution, or review of broad public policy.' "[278] In his judgment, "in our representative democracy neither

inger v. Ballard, 419 U.S. 498, 508 (1975); Frontiero v. Richardson, 411 U.S. 677, 689 (1973). He went on to state, "[I]ncreasingly outdated misconceptions concerning the role of females in the home rather than in the 'marketplace and world of ideas' were rejected as loose-fitting characterizations incapable of supporting state statutory schemes that were premised upon their accuracy." 429 U.S. at 198-99. *See* Stanton v. Stanton, 421 U.S. 7 (1975); Taylor v. Louisiana, 419 U.S. 522, 535 n.17 (1975). Just as misconceptions or archaic notions about the role of women implicit in gender-based classifications may not serve to validate those classifications under the equal protection clause, it can be argued that misconceptions about aliens' loyalty, for example, should not be used as a pretext for discrimination without any empirical proof of the truth of such an assumption.

273. 435 U.S. at 308 (footnote omitted). *See* note 269 *supra*.

274. *Id.* at 310.

275. *Id. See* Scheuer v. Rhodes, 416 U.S. 232, 245-47 (1974).

276. 435 U.S. at 310. *See* Elrod v. Burns, 427 U.S. 347 (1976).

277. 435 U.S. at 310.

278. *Id.*, quoting Sugarman v. Dougall, 413 U.S. 634, 647 (1973).

the constabulary nor the military is vested with broad policymaking responsibility. Instead, each implements the basic policies formulated directly or indirectly by the citizenry."[279] Justice Stevens would apply the following rationale: a state may not deny aliens equal access to employment opportunities without a good and relevant reason. Although aliens may be excluded from participation in policymaking, the police officer is not such a policy formulator. Even were this analysis not employed, the Court "should not uphold a statutory discrimination against aliens, as a class, without expressly identifying the group characteristic that justifies the discrimination."[280] Because Justice Stevens found that there was no such group characteristic, in his view the exclusion was a violation of equal protection.

Connelie leaves the "suspect" classification of alienage in an uncertain position. What was thought to be a classification to which strict judicial scrutiny applied[281] is now subject to varying standards of review. If a statutory exclusion of aliens is within a state's "constitutional prerogatives," the rational basis test will be applied. If not, then presumably a state must demonstrate a compelling interest in the exclusion and that no less drastic alternative is available. As Justice Stewart noted in his concurring opinion, "it is difficult if not impossible to reconcile the Court's judgment in this case with the full sweep of the reasoning and authority of some of our past decisions."[282] The status of classifications based on alienage, after *Connelie*, is thus uncertain.

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279. 435 U.S. at 310. Justice Stevens concluded, "[u]nder the standards announced in *Sugarman*, therefore, a blanket exclusion of aliens from this particular governmental institution is especially inappropriate." *Id.*

280. *Id.* at 311-12.

281. *See* note 219 *supra.*

282. 435 U.S. at 300 (Stewart, J., concurring).

* Member, third-year class.

Preemption and Commerce Clause

PREEMPTION

I. *Ray v. Atlantic Richfield Co.*

In March of 1978, the Supreme Court handed down a decision that had been anxiously awaited by two often antagonistic groups—environmentalists and oil companies. *Ray v. Atlantic Richfield Co.*[1] involved the question of whether the State of Washington could enforce certain regulations against oil tankers operating in Puget Sound. The resulting decision had more practical than legal significance. Although the Court did not stray from its established mode of preemption analysis, the decision struck down restrictive state regulations that would have increased shipping costs for oil, thereby increasing the retail costs of petroleum products.[2]

The federal law involved in *Ray* was the Ports and Waterways Safety Act of 1972 (PWSA),[3] enacted to protect life, property and the marine environment. The PWSA was designed to ensure vessel safety and the protection of navigable waters and adjacent shore areas from tanker cargo spillage.[4] Title I of the PWSA authorizes the Secretary of Transportation, through the Coast Guard, to establish and operate vessel traffic control systems for congested ports and to require ships to comply with such systems.[5] Title II requires the Secretary to establish rules and regulations concerning the design, construction and operation of vessels covered by the Act.[6] Amendments to the Act, proposed in 1977,[7] would supplement the federal standards for tankers over 20,000

1. 435 U.S. 151 (1978).

2. An example of the increased costs that would have resulted from enforcement of the invalidated requirements are those that would have arisen from the prohibition against the operation in Puget Sound of any oil tanker larger than 125,000 deadweight tons. This restriction would prohibit the use of "supertankers," which transport over half of all the oil shipped by water and achieve significant economies of scale.

3. Ports and Waterways Safety Act of 1972 (PWSA) §§ 101-107, 33 U.S.C. §§ 1221-1227 (1976); PWSA § 201, 46 U.S.C. § 391a (Supp. V 1975). The sections codified in 33 U.S.C. §§ 1221-1227 (1976) are under Title I of the PWSA, Pub. L. No. 92-340, 86 Stat. 424; the section codified in 46 U.S.C. § 391a (Supp. V 1975) is under Title II of the same Act, Pub. L. No. 92-340, 86 Stat. 427. Subsequent textual references to Title I and Title II will refer to the above enumerated sections of the PWSA.

4. *See* Ray v. Atlantic Richfield Co., 435 U.S. at 161.

5. 33 U.S.C. § 1221(1)-(2) (1976).

6. 46 U.S.C. § 391a (Supp. V 1975).

7. *Proposed Amendments to the Ports and Waterways Safety Act*, S. 682, 95th Cong., 1st Sess., 123 CONG. REC. S8748 (1977).

deadweight tons (DWT)[8] and set up comprehensive standards and procedures governing their design and operation.

The state regulations at issue were known collectively as the Washington Tanker Law.[9] They were enacted to regulate certain aspects of the design, size and movement of oil tankers in Puget Sound in order to decrease the likelihood of oil spills in the Sound and adjacent areas.[10] Three of the Tanker Law's provisions were challenged in *Ray*: (1) a requirement that both enrolled and registered[11] oil tankers of at least 50,000 DWT carry a state-licensed pilot while navigating Puget Sound;[12] (2) a requirement that enrolled and registered oil tankers weighing between 40,000 and 125,000 DWT satisfy certain design or safety standards, or else use tug escorts while navigating the Sound;[13] and (3) a complete prohibition against operation in the Sound of any tanker exceeding 125,000 DWT.[14]

An oil company, Atlantic Richfield, and a shipping concern, Seatrain Lines, Inc., challenged the constitutionality of the Tanker Law, claiming that it was invalid under both the commerce clause[15] and the supremacy clause[16] of the United States Constitution. In *Atlantic Richfield Co. v. Evans*,[17] a three-judge district court ruled the Tanker Law unconstitutional in its entirety.[18] The court held that the operative state regulations were preempted by the PWSA since both statutes were intended to regulate the same subject matter.[19] In looking to the con-

8. *Id.* § 104(5).

9. WASH. REV. CODE ANN. §§ 88.16.170-.190 (Supp. 1977).

10. *Id.* § 88.16.170.

11. *See* note 50 *infra*.

12. WASH. REV. CODE ANN. § 88.16.180 (Supp. 1977).

13. *Id.* § 88.16.190(2).

14. *Id.* § 88.16.190(1).

15. The commerce clause gives Congress the power to "regulate Commerce with foreign Nations, and among the several states." U.S. CONST. art. I, § 8, cl. 3.

16. U.S. CONST. art. VI, cl. 2.

17. No. C 75-648-M (W.D. Wash. Sept. 24, 1976).

18. *Id.*, slip op. at 6.

19. *Id.* The court viewed the purpose of Title II of the PWSA as the establishment of "a uniform set of regulations governing the types of ships permitted within the coastal waters of the United States and the conditions under which they would be permitted to operate." *Id.*, slip op. at 3. "Balkanization" of the regulatory authority over those interstate transportation systems, the court stated, was foreclosed by the national policy embodied in the federal act. *Id.*

The State of Washington had argued that the minimum design specifications required by WASH. REV. CODE ANN. § 88.16.190(1) were not preempted since they could be avoided so long as the tanker had a tugboat escort. No. C 75-648-M, slip op. at 3. The court rejected this argument, however, pointing out that Congress had given the Coast Guard the authority to require tug escorts in Puget Sound under hazardous conditions, 33 U.S.C. § 1221(3)(iv)

gressional intent embodied in the PWSA, the court noted that Congress did not invite state participation in the regulation of oil tankers.[20] Since the state statute had invaded, or at least overlapped, a federal regulatory scheme, supremacy clause principles mandated preemption of the state law. The United States Supreme Court agreed to review the case[21] and heard oral arguments in the fall of 1977.[22]

A. The Preemption Doctrine

Under the supremacy clause, state laws may be superseded or preempted by federal enactments in two situations: (1) where the state law can be "fairly interpreted"[23] to be in actual conflict with a valid congressional act;[24] and (2) where Congress has expressly or impliedly reserved the field for federal authority, whether or not there is a federal law in effect.[25] Thus, a state law that otherwise has no constitutional or legal infirmity may still be unenforceable if Congress has occupied the regulatory field. Although preemption has been referred to as a "preferred ground" in the constitutional analysis of state power to regulate,[26] courts have differed as to the appropriate mode of analysis and the doctrine's application has at times been inconsistent.[27] Generally, preemption on the grounds of conflict between the state and federal laws does not require conflict on the face of the provisions. State laws have been struck down where a court has found an "actual conflict"[28]

(1976), and that the Coast Guard had considered so doing. No. C 75-648-M, slip op. at 3-4. Thus, even the Tanker Law's tugboat escort provision was held preempted by the PWSA.

20. No. C 75-648-M, slip op. at 4-5. In reaching this conclusion, the court distinguished the congressional intent behind the PWSA from that embodied in other environmental regulations, including the Estuarine Act of 1968, 16 U.S.C. §§ 1221-1226 (1976), the Federal Water Pollution Control Act, 33 U.S.C. §§ 1151-1165 (1976), the Deepwater Ports Act of 1974, 33 U.S.C. §§ 1501-1524 (1976), and the Clean Air Act, 42 U.S.C. § 1857 (1976). In these other statutes, Congress had invoked the concept of "cooperative federalism," whereby it funded and encouraged the coastal states to design comprehensive and forward-looking coastal management plans.

21. 430 U.S. 905 (1977).

22. The case was argued on Oct. 31, 1977.

23. Savage v. Jones, 225 U.S. 501, 533 (1912).

24. *See, e.g.*, Perez v. Campbell, 402 U.S. 637 (1971); Free v. Bland, 369 U.S. 663 (1962); McDermott v. Wisconsin, 228 U.S. 115 (1913).

25. *See, e.g.*, Campbell v. Hussey, 368 U.S. 297 (1961); Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947); Erie R.R. v. New York, 233 U.S. 671 (1914).

26. *See* Note, *Preemption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208 (1959). *See generally* Friendly, *Federalism: A Foreword*, 86 YALE L.J. 1019 (1977); Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623 (1975).

27. *See generally* Catz & Lenard, *The Demise of the Implied Federal Preemption Doctrine*, 4 HASTINGS CONST. L.Q. 295 (1977).

28. Savage v. Jones, 225 U.S. at 533.

with the objectives behind the federal enactment.[29] In such cases, courts have examined the effect of the state provision to see if it encourages or discourages conduct that Congress has also sought to regulate.[30]

In the 1977 case of *Jones v. Rath Packing Co.*,[31] for example, the Court invalidated a California labeling regulation requiring that the average weight of any given package not be less, at the time of sale, than the net weight or measure stated upon the package.[32] In deciding the preemption question, the Court viewed its task as that of determining "whether, under the circumstances of this particular case, [the State's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[33] The federal law in question was the Fair Packaging and Labeling Act (FPLA), as amended by the Wholesome Meat Act.[34] The Court pointed out that Congress had clearly stated that a major purpose of the FPLA was to facilitate value comparisons among similar products; this goal, the Court declared, "[o]bviously . . . cannot be accomplished unless packages that bear the same indicated weight in fact contain the same quantity of the product for which the consumer is paying."[35] The California law allowed differences in weight only where they were caused by unavoidable deviations in the manufacturing process;[36] in contrast, the federal law permitted deviations caused by unavoidable losses due to both the manufacturing and distribution processes.[37] Thus, the Court stated, "[C]onsumers throughout the country who attempted to compare the value of identically labeled packages of flour would not be comparing packages which contained identical amounts of [the product]."[38] As a result, a major purpose of the FPLA—the promotion of comparison shopping—was frustrated by the California law.[39] Due to this "obsta-

29. *See, e.g.*, City of Burbank v. Lockheed Air Terminal Inc., 411 U.S. 624 (1973); Nash v. Florida Indus. Comm'n, 389 U.S. 235 (1967). *Cf.* Parker v. Brown, 317 U.S. 341 (1943).

30. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 377-84 (1978).

31. 430 U.S. 519 (1977).

32. CAL. BUS. & PROF. CODE § 12211 (West Supp. 1977).

33. 430 U.S. at 526 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941) and citing De Canas v. Bica, 424 U.S. 351, 363 (1976); Perez v. Campbell, 402 U.S. 637, 649 (1971); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 141 (1963)).

34. 21 U.S.C. §§ 601-695 (1976). Section 607(b) requires that "[a]ll . . . meat and meat food products inspected at any establishment under the authority of this subchapter . . . shall at the time they leave the establishment bear . . . the information required under paragraph (n) of section 601 of this title." *Id.* § 607(b).

35. 430 U.S. at 541.

36. *Id.* at 531.

37. *Id.* at 533.

38. *Id.* at 543.

39. *Id.*

cle"[40] to the federal goal, the state law was held preempted.

Even where a court fails to find a conflict between state and federal laws, it can still hold the state statute preempted if it determines that Congress has expressly or impliedly decided that federal authority shall occupy the field.[41] If such a determination of congressional intent is made, the state law will be preempted even if it essentially duplicates the federal policy or provisions. When searching for the intent of Congress, the Supreme Court has generally started with the assumption that the state police powers are not to be superseded by the federal act absent a "clear and manifest" purpose of Congress.[42] With respect to implying such a purpose, the Court has developed the rule that federal occupation "should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained."[43]

Although the above-mentioned principles embrace the basic concepts behind a preemption analysis, courts have considered a variety of factors when attempting to ascertain congressional intent: (1) whether the federal regulatory scheme is so comprehensive or pervasive as to make reasonable the inference that Congress has deemed the federal authority to occupy the field;[44] (2) whether the federal act touches upon an area in which the federal interest is so dominant that preclusion of enforcement of state laws on the same subject may be assumed;[45] (3) the presence of a federal regulatory agency or licensing administration;[46] and (4) whether the field requires uniformity as opposed to local regulation.[47] It was against this background of preemption analysis that the Supreme Court was called upon to determine the enforceability of the Washington Tanker Law.

40. Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

41. *See* note 25 and accompanying text *supra*.

42. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); *see* Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977).

43. Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142 (1963). *See* L. TRIBE, *supra* note 30, at 384-86.

44. *See, e.g.*, Pennsylvania v. Nelson, 350 U.S. 497 (1956); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); Cloverleaf Butter Co. v. Patterson, 315 U.S. 148 (1942).

45. *See, e.g.*, Zschernig v. Miller, 389 U.S. 429 (1968); Hines v. Davidowitz, 312 U.S. 52 (1941).

46. *See, e.g.*, Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959); Castle v. Hayes Freight Lines, Inc., 348 U.S. 61 (1954). *Cf.* Head v. New Mexico Bd. of Examiners, 374 U.S. 424 (1963); Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960).

47. *See, e.g.*, Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851).

B. The Ray *Case*

After briefly stating the facts of the case and summarizing the traditional preemption principles outlined above, the Court in *Ray v. Atlantic Richfield*[48] proceeded to examine the challenged provisions of the Washington Tanker Law, measuring them against the corresponding provisions of, and the congressional intent embodied in, the PWSA. Part III of Justice White's majority opinion[49] was an examination of the section of the Tanker Law that required both enrolled and registered[50] oil tankers of at least 50,000 DWT to have a state-licensed pilot on board while navigating Puget Sound.[51] The Court agreed with the district court's holding that the Tanker Law directly conflicted with 46 U.S.C. §§ 215 & 364[52] insofar as vessels enrolled in the coastal trade were concerned.[53] Thus, to that extent, the Tanker Law was preempted.

The Court reached this conclusion by examining the language of the two federal sections. Section 364 provides that unregistered coastwise seagoing steam vessels subject to the federal navigation laws shall be under the control and direction of pilots licensed by the Coast Guard.[54] Section 215, prohibits state and municipal governments from imposing upon pilots of such vessels any obligation to procure state licenses.[55] The Court focused specifically on the language in section 215, explaining that the statute should not be construed to affect any state laws requiring a state-licensed pilot on vessels other than coastwise steam vessels.[56] The Court also noted that under long-standing precedent, the two PWSA sections had been read together to give the federal government exclusive authority to regulate pilots on enrolled

48. 435 U.S. 151 (1978).

49. *Id.* at 158-60. In Part I, Justice White related the facts of the case, *id.* at 155-57; Part II summarized the basic principles of the federal preemption doctrine. *id.* at 157-58.

50. The Court explained in a footnote that enrolled vessels are those "engaged in domestic or coastwise trade or used for fishing;" registered vessels are those engaged in trade with foreign countries. *Id.* at 158 n.7 (quoting Douglas v. Seacoast Products, Inc., 431 U.S. 265, 272-73 (1977)).

51. WASH. REV. CODE ANN. § 88.16.180 (Supp. 1977).

52. 46 U.S.C. §§ 215, 364 (Supp. V 1975).

53. 435 U.S. at 158-59. All nine Justices joined in this part of the opinion.

54. 46 U.S.C. § 364 (Supp. V 1975). Section 391a(2) of that title includes within the definition of "steam vessels" all vessels, regardless of size, that carry liquid cargo in bulk that is (A) inflammable or combustible or (B) oil of any kind or in any form or (C) designated as a hazardous polluting substance. 46 U.S.C. § 391a(2) (Supp. V 1975).

55. 46 U.S.C. § 215 (Supp. V 1975).

56. 435 U.S. at 159.

vessels.[57] The state provisions directing enrolled tankers to take on state-licensed pilots were therefore in direct conflict with federal law and, accordingly, invalid under the preemption doctrine.[58] On the other hand, there was no corresponding coverage in the PWSA with respect to registered vessels; the states were therefore free to enforce pilotage requirements on such vessels.[59]

In Part IV of the opinion, Justice White examined the Tanker Law's requirement of standard safety features for tankers between 40,000 and 125,000 DWT.[60] His discussion of this provision involved an interpretation of both the congressional intent underlying the PWSA and the objective sought to be accomplished by the state in imposing the requirements. In this respect, Justice White focused on whether the state law would "frustrate the congressional desire of achieving uniform, international standards" and therefore be at odds with the objective sought to be obtained by the federal law.[61]

Title II of the PWSA was interpreted by the Court as having the twin goals of providing for vessel safety and protecting the marine environment.[62] The Secretary of Transportation is required to establish the necessary rules and regulations relating to the design, construction, and operation of all vessels specified within the Act.[63] No vessels subject to Title II may have on board any of the specified cargoes until a certificate of inspection is issued.[64] In lieu of such inspection, the Coast Guard can accept from foreign vessels valid certificates of inspection recognized under law or treaty by the United States. Similar provisions

57. *Id. See* Anderson v. Pacific Coast S.S. Co., 225 U.S. 187 (1912); Spraigue v. Thompson, 118 U.S. 90 (1886).

58. *See* notes 23-24 and accompanying text *supra.*

59. 435 U.S. at 159-60. In this respect, Justice White differed with the lower court's decision, which held the state law null and void in its entirety, even though the pilotage requirement only conflicted with federal law to the extent that it applied to coastwise seagoing tankers. Justice White called the lower court's judgment "overly broad" since 46 U.S.C. § 215 explicitly left to the states the power to regulate pilots of registered vessels. *Id. See* note 56 and accompanying text *supra.*

60. 435 U.S. at 160-68. WASH. REV. CODE ANN. § 88.16.190(2) (Supp. 1977) requires, in part, the following features: (a) shaft horsepower in the ratio of one horsepower to each two and one-half DWT; (b) twin screws; (c) double bottoms, underneath all oil and liquid cargo compartments; and (d) two operational radars.

61. 435 U.S. at 168 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

62. *Id.* at 161. 46 U.S.C. § 391a(1) (codifying Title II) states that the protection of life, property, and the marine environment from harm requires the promulgation of "comprehensive minimum standards of design, construction, alteration, repair, maintenance and operation" for vessels carrying certain cargoes in bulk—primarily oil and fuel tankers. 46 U.S.C. § 391a(1) (Supp. V 1975).

63. 46 U.S.C. § 391a(3) (Supp. V 1975).

64. *See generally* 46 C.F.R. §§ 30.01-1 to 40.15-1 (1977).

exist with respect to inspections for compliance with federal regulations issued for the protection of the marine environment.[65]

The Court interpreted this statutory pattern as indicating that insofar as design characteristics were concerned, Congress had vested in the Secretary of Transportation the duty of determining which oil tankers were safe enough to navigate in United States waters.[66] Congress therefore intended to establish "uniform national standards for design and construction of tankers that would foreclose the imposition of different or more stringent state requirements."[67] In so characterizing the statutory scheme, the Court was careful to note that it did not question prior cases which had held that enrolled and registered vessels must conform to reasonable, nondiscriminatory conservation and environmental protection measures imposed by a state.[68] It distinguished them by pointing out that the cases sustaining the application of state laws to federally licensed or inspected vessels did not involve a substantive federal law that attempted to achieve the same object as the state law in question.[69] In *Ray*, on the other hand, the federal and state schemes were aimed at precisely the same ends—ensuring vessel safety and protecting the marine environment. The Court, therefore, held: "The Supremacy Clause dictates that the federal judgment that a vessel is safe to navigate United States waters prevail over contrary state judgment."[70]

A different conclusion was reached with respect to the Tanker Law provision requiring tug escorts for tankers over 40,000 DWT that did

65. *See generally* 49 C.F.R. § 1.46(n)(4) (1977).

66. 435 U.S. at 163.

67. *Id.*

68. *Id. See* Douglas v. Seacoast Products, Inc., 431 U.S. 265, 277 (1977) (citing Smith v. Maryland, 59 U.S. (18 How.) 71 (1855)); Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960); Manchester v. Massachusetts, 139 U.S. 240 (1891).

69. 435 U.S. at 164. In Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960), for example, the Court held that no overlap existed between the scope of the federal ship inspection law and the challenged municipal smoke abatement law. *Id.* at 446. In Kelly v. Washington, 302 U.S. 1 (1937), the limited nature of the federal regulations was held not to exclude state regulation of matters beyond the federal statute. *Id.* at 8.

70. 435 U.S. at 165. The Court also noted that the legislative history of Title II demonstrated a "decided congressional preference for arriving at international standards for building tank vessels." *Id.* at 166. Since Congress expressed "a preference for international action and expressly anticipated that foreign vessels would or could be considered sufficiently safe for certification by the Secretary if they satisfied the requirements arrived at by treaty or convention," *id.* at 167-68, the Court determined that "Title II leaves no room for the States to impose different or stricter design requirements than those which Congress has enacted with the hope of having them internationally adopted or has accepted as the result of international accord." *Id.* Six members of the Court joined in this part of the majority opinion. *See* note 89 and accompanying text *infra*.

not satisfy the specified design requirements.[71] The Court held that the state was not precluded by the supremacy clause from enacting the tug escort requirement. The preemption analysis of this provision involved an examination of Title I of the PWSA.[72] Under that federal law, the Secretary is authorized to establish and operate "vessel traffic services and systems" for ports that suffer from congested traffic in their waterways; the Secretary may also require ships to comply with those systems and have the equipment necessary to do so.[73] The Court viewed the purpose behind this grant of power as that of preventing "damage to vessels, structures, and shore areas, as well as environmental harm to navigable waters and the resources therein that might arise from vessel or structure damage."[74]

The relevant inquiry under Title I with respect to the state's power to impose a tug escort rule was deemed by the Court to be "whether the Secretary has either promulgated his own tug requirement for Puget Sound tanker navigation or has decided that no such requirement should be imposed at all."[75] In answer to this question, the Court noted that it did not appear that the Secretary had taken either course.[76] An advance notice of proposed rulemaking to require tug escorts for certain vessels operating in confined waters had been issued,[77] but even if those rules would preempt the Tanker Law's tug escort provision, the state law would not have to give way to the federal enactment under the supremacy clause until the federal rules were actually

71. WASH. REV. CODE ANN. § 88.16.190(2) (Supp. 1977).

72. 33 U.S.C. §§ 1221-1227 (1976).

73. *Id.* § 1221(1)-(2).

74. 435 U.S. at 169. Other powers vested in the Secretary include: (1) control of vessel traffic under hazardous conditions by means of specifications with respect to travel times, size and speed limitations, and "safe" operating characteristics, 33 U.S.C. § 1221(3) (1976); (2) authority to require foreign trade vessels to carry pilots in the absence of a state requirement, *id.* § 1221(5); (3) power to establish minimum safety equipment requirements for shore structures, *id.* § 1221(7); and (4) power to establish waterfront safety zones or other measures for limited, controlled, or conditional access when necessary for the protection of vessels, structures, waters, or shore areas, *id.* § 1221(8). In addition, § 1222(b) provides that nothing in Title I is to "prevent a State or political subdivision thereof from prescribing for structures only higher safety equipment requirements or safety standards than those which may be prescribed pursuant to this chapter." *Id.* § 1222(b).

75. 435 U.S. at 171-72.

76. *Id.* at 172.

77. 41 Fed. Reg. 18,770 (1976) (amending the Navigation Safety Regulations issued under Title I, 33 C.F.R., pt. 164 (1977)). The professed purpose of these rules is to reduce the potential for collisions, rammings, and groundings in confined waters. 435 U.S. at 172 n.22. The following factors will be considered in developing the rules: size of vessel, displacement, propulsion, availability of multiple screws or bow thrusters, controllability, type of cargo, availability of safety standards, and actual or predicted adverse weather conditions. 41 Fed. Reg. 18,771 (1976).

in effect.[78] Accordingly, the Court held that the district court had erred in holding that the alternative tug requirement of the Washington Tanker Law was preempted due to its conflict with the PWSA.[79]

The sixth part of the *Ray* opinion examined the provision of the Tanker Law excluding from Puget Sound any tanker in excess of 125,000 DWT.[80] This provision was perhaps the most controversial of those challenged, since upholding it would effectively prohibit the oil companies from using their supertankers to transport oil, despite the fact that such tankers were the most common mode of transport for the major companies.[81] The Court focused on the PWSA provisions codified in 33 U.S.C. § 1221(3)(iii), which authorized the Secretary of Transportation to establish vessel size and speed limitations, and 33 U.S.C. § 1222(b), which, by implication, forbade the states from imposing higher equipment or safety standards on vessels.[82] Limitations on vessel size were interpreted as being safety standards; thus, the relevant legal inquiry was whether the Secretary had addressed and acted upon the question of such limitations.[83]

According to the Court, it appeared "sufficiently clear" that Federal authorities had dealt with the issue of tanker size.[84] The Secretary had already promulgated a rule prohibiting the passage of more than one 70,000 DWT vessel through Rosario Strait at any given time; in periods of bad weather, that size limitation is reduced to approximately 40,000 DWT.[85] This rule was much more limited than that of the Tanker Law, which would impose a general ban on the operation of large tankers in Puget Sound. Given that section 1222(b) prohibits a state from imposing higher safety standards than those set by the Secre-

78. 435 U.S. at 172.

79. *Id.* at 173. Seven members of the Court joined in this part of the majority opinion. *See* notes 98-99 and accompanying text *infra*.

80. 435 U.S. at 173-78. *See* WASH. REV. CODE ANN. § 88.16.190(1) (Supp. 1977).

81. *See* note 2 *supra*.

82. 435 U.S. at 174. Section 1222(b) permitted the states to impose higher equipment and safety standards "for structures only." 33 U.S.C. § 1222(b) (1976). Thus, the Court stated, higher standards for vessels were impliedly barred. In support of this interpretation, the opinion cited an explanation in the House Report that § 1222(b) was amended to provide "a positive statement retaining State jurisdiction over structures and making clear that State regulation of vessels is not contemplated." *Id.* at 175 (quoting H.R. REP. NO. 563, 92nd Cong., 1st Sess. 15 (1971)).

83. *Id.* at 174. The Court began its discussion with the premise that the Secretary had the authority to establish "vessel size and speed limitations," 33 U.S.C. § 1221(3)(iii) (1976), and that local Coast Guard officials had been authorized to exercise that power on his behalf. 435 U.S. at 174.

84. 435 U.S. at 175.

85. *Id.* at 174-75.

tary, the state size limits were unenforceable.[86]

Justice Marshall, joined by Justices Brennan and Rehnquist, wrote an opinion concurring in part and dissenting in part.[87] He agreed with the majority's conclusion that the pilotage requirement was preempted only with respect to enrolled vessels and that the tug escort requirement was valid until the Secretary of Transportation promulgated a federal rule or determined that such a rule was unnecessary.[88] Justice Marshall did not, however, agree with the Court as to the necessity of deciding the validity of the safety features alternative to the tug requirement. He pointed out that the practical effect of the state provision was that all tankers had employed tug escorts rather than attempt to satisfy the alternative safety requirements.[89]

Justice Marshall also disagreed with the majority's opinion that the Tanker Law's size limitation was preempted under the supremacy clause. Since Title I merely authorized and did not require the Secretary to issue regulations to implement the provisions of the Title, Justice Marshall agreed that the pertinent inquiry was whether the Secretary had addressed and acted upon the question of size limits.[90] However, he did not view the rule regulating vessel passage in the Rosario Strait as constituting a determination that the Tanker Law's size limitations were inappropriate or unnecessary. He found no indication that the Coast Guard had considered the need for promulgating size

86. *Id.* at 175. The Court also noted that its conclusion was consistent with the legislative history of Title I of the PWSA. The twin themes of consistency of regulation and thoroughness of consideration pervaded the House and Senate Committee Reports on the federal act. For example, one representative had expressed the view that "[w]e do not want the States to resort to individual actions that adversely affect our national interest." *Id.* at 176 n.27 (quoting *Hearings on H.R. 867, H.R. 3635, H.R. 8140 before the Subcomm. on Coast Guard, Coast and Geodetic Survey, and Navigation of the House Comm. on Merchant Marine and Fisheries*, 92d Cong., 1st Sess. 30 (1971) (statement of Rep. Keith) [hereinafter cited as *1971 Hearings*]. Admiral Bender, Commandant of the Coast Guard, had responded that the Coast Guard believed it "preferable for the approach to the problem of the giant tankers in particular to be resolved on an international basis." *1971 Hearings*, *supra*, at 30. The Court viewed such statements as indicating "that [Congress] desired someone with an overview of all the possible ramifications of the regulation of oil tankers to promulgate limitations on tanker size and that he should act only after balancing all of the competing interests." 435 U.S. at 177. Six members of the Court joined in this part of the majority opinion. *See* notes 90-93 and accompanying text *infra*.

87. 435 U.S. at 180-87.

88. *Id.* at 181.

89. *Id.* Justice Marshall also noted that the relative expense of compliance with the state's safety requirements made it "extremely unlikely" that any tankers would be constructed or redesigned to meet the law's requirements, at least in the foreseeable future. *Id.*

90. *Id.* at 181-82.

limitations for the entire Sound.[91] In addition, even if the Rosario Strait rule did result from such a consideration, the challengers had not demonstrated that the rule evinced a judgment contrary to the Tanker Law's provisions.[92] Justice Marshall felt that under the PWSA, the existence of local vessel traffic control schemes should be weighed to determine "whether, and to what extent, federal size limitations should be imposed."[93] Since the Rosario Strait rule was not even under consideration prior to the passage of the Tanker Law, there was no basis for finding that the Tanker Law's size limitation was in conflict with the federal rule.[94] Justice Marshall concluded his preemption discussion by pointing out that the Tanker Law was a measure tailored to respond to unique local conditions—"the unusual susceptibility of Puget Sound to damage from large oil spills and the peculiar navigational problems associated with tanker operations in the Sound."[95] Thus, the state law was not merely aimed at safety and environmental problems in general, and the federal policy therefore did not have to prevail.[96]

Justice Stevens, joined by Justice Powell, wrote an opinion concurring in part and dissenting in part.[97] He agreed with the Court that the state's "standard safety features" provision was invalid, but took issue with the Court's conclusion that the tug escort requirement was a permissible alternative.[98] In Justice Stevens' view, the tug escort requirement was merely part of the invalid design requirements, since it was imposed only on those tankers that did not comply with those requirements. Accordingly, "[t]he federal interest that prohibits state enforcement of these requirements should also prohibit state enforcement of a special penalty for failure to comply with them."[99]

Ray did not mark any significant change in the Court's preemption analysis. Justice White's opinion was consistent with prior cases in that it first looked for a direct conflict between the state and federal laws and, where it found none, went on to inquire whether Congress

91. *Id.* at 183.
92. *Id.* at 183-84.
93. *Id.* at 184. Justice Marshall cited 33 U.S.C. § 1222(e) (1976), which states in part that "[i]n determining the need for, and the substance of, any rule or regulation or the exercise of other authority hereunder the Secretary shall, among other things, consider . . . (6) existing vessel traffic control systems, services, and schemes; and (7) local practices and customs . . . ." 435 U.S. at 184 n.4 (quoting 33 U.S.C. § 1222(e) (1976)).
94. 435 U.S. at 184.
95. *Id.* at 184-85.
96. *Id.*
97. *Id.* at 187.
98. *Id.* at 188.
99. *Id.* at 189.

had intended to occupy the regulatory field. Also in accordance with the traditional preemption doctrine, the determination of congressional intent was made by first examining the federal law's language and then focusing on the legislative history of the federal enactment. Thus, the practical result of the case is perhaps the most significant—Washington was severely restricted in its attempt to protect its environment from the serious danger posed by supertankers transporting vast amounts of oil.

The problem emerging from *Ray* pertains to the alternatives a state may have when it wishes to impose environmental safeguards on the use of its waterways. Although the *Ray* decision appears sound with respect to the Court's established precedents in the area of preemption analysis, the decision has severely limited the states' ability to enact provisions that may provide the only protection against the dangers inherent in the transporation of oil.

Aside from the theoretical and practical implications of *Ray*, the case poses another question: whether the Court's decision can be read as an indication of a heightened concern for federal supremacy in the energy field. By striking down the Tanker Law provision[100] that would have excluded from Puget Sound any tanker displacing in excess of 125,000 DWT,[101] the Court in *Ray* prevented the State of Washington from prohibiting the use in its waters of the most common mode of oil transportation—supertankers.[102] This particular holding of preemption generated the most extended debate within the Court. The majority found that by promulgating a rule concerning size limitations with respect to Rosario Strait,[103] the federal authorities had dealt with the issue of tanker size in relation to navigation in Puget Sound.[104] In contrast, Justice Marshall, joined by Justices Brennan and Rehnquist, believed that on the record, the Rosario Strait rule "cannot be said to reflect a determination that the size limitations set forth in the Tanker Law are inappropriate or unnecessary."[105] He found no support for holding that the Rosario Strait rule represented a consideration of the question of size limitations for the entire Sound.[106] He further noted

100. WASH. REV. CODE ANN. § 88.16.190(1) (Supp: 1977).

101. 435 U.S. at 173-78. *See* notes 80-86 and accompanying text *supra.*

102. *See* note 2 and text accompanying note 81 *supra.*

103. *See* text accompanying note 85 *supra.*

104. 435 U.S. at 175.

105. *Id.* at 183 (Marshall, J., concurring in part and dissenting in part).

106. *Id.* In a footnote, *id.* at 183 n.3, Justice Marshall pointed out that the Rosario Strait size limitation was not contained in any written rule or regulation, that the Puget Sound Vessel Traffic System, 33 C.F.R. § 161.(B)(1976), *as amended by* 42 Fed. Reg. 29,480 (1977),

that those challenging the Tanker Law had not shown that it was necessarily inconsistent with that rule.[107] Because local regulatory schemes must be taken into account in determining whether federal size limitations should be imposed,[108] and since there was no evidence that the Rosario Strait rule preexisted the Tanker Law,[109] the two provisions could well have been designed to coexist.[110] Thus, the majority opinion and Justice Marshall's dissent on this point demonstrate that there was considerable doubt as to whether the Secretary, through the Coast Guard, had acted so as to preempt the Tanker Law prohibition against the operation of supertankers. In such situations, the Court has held that "the proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted.' "[111] There was therefore ample authority for holding that this Tanker Law provision was not preempted until such time as it became clear that its prohibition was indeed in actual conflict with a federal rule.

The result in *Ray* can perhaps be explained by the strong federal interest in governing the interstate and international flow of goods within the United States free from the potentially divisive and disruptive effect of numerous inconsistent state regulations.[112] In recent years, the continuing national energy crisis has arguably underscored the need for a centralized approach to energy problems. The state law challenged in *Ray*, a singular response to the perceived ecological threat arising from the use of oil tankers, would have effectively prohibited the operation of supertankers in Puget Sound.[113] Although the

did not include any size limitation, and that the need for such a limitation was never considered during the rulemaking process, *see* 39 Fed. Reg. 25,430 (1974) (summary of comments received during rulemaking); 38 Fed. Reg. 21, 228 (1973) (notice of proposed rulemaking).

107. 435 U.S. at 183-84 (Marshall, J., concurring in part and dissenting in part).

108. 33 U.S.C. § 1222(e) (1976). *See* 435 U.S. at 184 n.4.

109. 435 U.S. at 184 & n.5.

110. *Id.* at 184.

111. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 127 (1973) (quoting Silver v. New York Stock Exch., 373 U.S. 341, 357 (1963)). *Ware* was a unanimous decision; Justice Stewart took no part in the decision of the case. The *Ware* Court cited as support for its approach to preemption Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963); Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960); International Ass'n of Machinists v. Gonzales, 356 U.S. 617 (1958); Union Brokerage Co. v. Jensen, 322 U.S. 202 (1944); Savage v. Jones, 225 U.S. 501 (1912). 414 U.S. at 127 n.8.

112. Such concerns led the framers of the Constitution to include the commerce clause which granted Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States." U.S. CONST. art. I, § 8, cl. 3.

113. *See* note 2 and text accompanying note 81 *supra*.

states have a strong interest in protecting their environments,[114] the supertanker provision of the Washington Tanker Law encroached upon an area of dominant federal concern in which Congress has established substantive rules of law. As such, it could not withstand scrutiny under the supremacy clause.

Because there was a reasonable basis for holding the supertanker provision preempted,[115] it is probably premature to view *Ray* as indicative of a bias toward exclusive federal regulation in the energy field. The question of whether the Court is moving in this direction must await further litigation implicating federal supremacy in this area. Nevertheless, a clearer indication of the Court's attitude on the matter should be forthcoming, as questions concerning supremacy in the energy field will undoubtedly be litigated with increasing frequency in the future.

Federal Labor Law Preemption

Introduction

A mode of preemption analysis somewhat different from the traditional approach discussed above[116] is utilized where a federal regulatory agency is involved. Although the establishment of such an agency is not necessarily indicative of a congressional intent to occupy a given field, an examination of Congress' motivation in creating the agency may aid in defining the parameters of federal preemption of state jurisdiction. In its October 1977 Term, the Supreme Court decided two cases concerning the jurisdiction of the National Labor Relations Board (NLRB). *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*[117] addressed the question of state court jurisdiction in a trespass action arising from labor picketing. *Malone v. White Motor Corp.*[118] examined the extent and nature of federal preemption of state legislation in the area of employee pension plans. Although the two cases dealt with very different aspects of labor law preemption, it is significant to look at them together as they both resulted in a limitation of the federal role in labor-management relations.

114. *See* Douglas v. Seacoast Products, Inc., 431 U.S. 265, 277 (1977); Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 446 (1960).

115. *See* notes 80-86 and accompanying text *supra.*

116. *See* notes 23-47 and accompanying text *supra.*

117. 436 U.S. 180 (1978).

118. 435 U.S. 497 (1978).

I. *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*

A. Background

The significance of *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*[119] cannot be understood without an examination of the preceding line of Supreme Court decisions involving the jurisdiction of state courts over labor-management relations.[120] The focal point in this line of cases is the 1959 case of *San Diego Building Trades Council v. Garmon*,[121] which involved a state court action arising out of union picketing. The defendant unions had sought from plaintiff lumber company an agreement to hire only union members. The company refused, claiming in part that they could not enter into such an agreement unless their employees had designated one of the unions as the collective bargaining agent. The unions began peaceful picketing in front of plaintiff's business, exerting pressure on both employees and customers to stop dealing with the company, whereupon plaintiff sued for damages and injunctive relief. Although the trial court found the sole purpose of the unions' activities was to compel execution of a union contract,[122] the unions claimed that their only aim was to educate plaintiff's employees and to persuade them to join the union.[123] The trial court enjoined the unions from picketing until one of them had been designated as a collective bargaining agent; the court also awarded damages.[124] In addition to this state court proceeding, the plaintiffs had commenced a representation proceeding before the NLRB (Board), which declined to exercise jurisdiction, apparently because an inadequate monetary amount of interstate commerce was involved.[125]

On appeal,[126] the California Supreme Court sustained the trial court's judgment, reasoning that the state court had jurisdiction over the dispute because the NLRB had declined to hear the case.[127] On review by certiorari, the United States Supreme Court held that the

119. 435 U.S. 497 (1978).

120. For a comprehensive discussion of these labor law preemption decisions, see Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337 (1972).

121. 359 U.S. 236 (1959). *See generally* Cox, *supra* note 120; Lesnick, *Preemption Reconsidered: The Apparent Reaffirmation of Garmon*, 72 COLUM. L. REV. 469 (1972).

122. 359 U.S. at 237.

123. *Id.*

124. *Id.* at 237-38.

125. *Id.* at 238.

126. 45 Cal. 2d 657, 291 P.2d 1 (1955).

127. *Id.* at 663, 291 P.2d at 5.

NLRB's refusal to exercise its jurisdiction did not give a state the power to regulate activities from which it was otherwise precluded.[128] The Court vacated the judgment and remanded the case for reconsideration on the issue of damages. On remand, the California Supreme Court set aside the injunction but sustained the award of damages.[129] The United States Supreme Court reversed that decision,[130] holding that the jurisdiction of any court is preempted by the National Labor Relations Act (NLRA) if the activity in question is arguably within the jurisdiction of the Board.[131]

Justice Frankfurter, writing for the majority,[132] noted that it had been "judicially necessary to preclude the States from acting" when their exercise of power over particular activities "threatened interference with the clearly indicated policy of industrial relations."[133] Absent such interference, however, a state properly could exercise concurrent jurisdiction with the NLRB; Justice Frankfurter proceeded to describe some situations in which this concurrent authority would be appropriate. The states have power to regulate where the activity in question is merely a peripheral concern of the Labor Management Relations Act.[134] The states also have such authority in situations where the regulated conduct touches "interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act."[135]

In contrast to the situations justifying state jurisdiction, Justice Frankfurter stated that when it is "clear or may fairly be assumed"[136] that the activities which the state attempts to regulate are either pro-

128. 353 U.S. 26 (1957). Two companion cases were Guss v. Utah Labor Relations Bd., 353 U.S. 1, and Meat Cutters Local 427 v. Fairlawn Meats, Inc., 353 U.S. 20 (1957).

129. 49 Cal. 2d 595, 320 P.2d 473 (1958).

130. 359 U.S. 236 (1959).

131. *Id.* at 245.

132. Chief Justice Warren and Justices Brennan, Douglas and Black joined in the majority opinion. Justices Clark, Whittaker and Stewart joined in Justice Harlan's concurring opinion.

133. 359 U.S. at 243 (citing, *inter alia*, Youngdahl v. Rainfair, 355 U.S. 131 (1957); Guss v. Utah Labor Relations Bd., 353 U.S. 1 (1957); Local 25, Int'l Bhd. of Teamsters v. New York, N.H. & H.R. Co., 350 U.S. 155 (1956); Weber v. Anheuser-Busch, Inc., 348 U.S. 468 (1955)).

134. *Id.* (citing International Ass'n of Machinists v. Gonzales, 356 U.S. 617 (1957)).

135. *Id.* at 244 (citing UAW v. Russell, 356 U.S. 634 (1957); Youngdahl v. Rainfair, 355 U.S. 131 (1957); UAW v. Wisconsin Employment Relations Bd., 351 U.S. 266 (1956); United Constr. Workers v. Laburnum Const. Corp., 347 U.S. 656 (1955)).

136. *Id.*

tected by section 7 of the NLRA,[137] or constitute an unfair labor practice under section 8 of that Act,[138] the state jurisdiction must yield to the federal enactment.[139] Acknowledging that it is not always clear whether an activity is either protected or prohibited under the NLRA, the Court directed that this determination be made by the Board and not by state courts or even the United States Supreme Court.[140] If the NLRB decides that a certain activity comes under the Act, the states are precluded from adjudicating the matter;[141] if, on the other hand, the Board decides that the activity is neither protected nor prohibited, the states may exercise jurisdiction.[142] If the Board declines to make any determination on the issue, the states are still precluded from exercising jurisdiction over the dispute.[143] Justice Frankfurter reasoned that to allow the states to regulate activities that are even potentially subject to federal control would involve too great a risk that a state's action would conflict with national labor policy.[144] Thus, emphasis was placed on the NLRB's unifying role.

In the decade following the *Garmon* decision, the Court appeared to retreat somewhat from its strict construction of state power in labor-management relations. Although the Court generally showed deference to federal authority in such areas as strikes, boycotts and picketing,[145] there were some cases that the Court found touched local concerns without significantly interfering with federal primacy, including laws prohibiting defamation[146] and the intentional infliction of emotional distress.[147] A few of the Justices have voiced dissatisfaction with the *Garmon* rule,[148] but the doctrine was reaffirmed in 1971 in

137. 29 U.S.C. § 157 (1976). "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." *Id.*

138. 29 U.S.C. § 158 (1976). Section 8 generally describes "unfair labor practices."

139. 359 U.S. at 244. *See also id.* at 245: "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the [NLRB] if the danger of state interference with national policy is to be averted."

140. *Id.* at 244-45. The Court stated that "[i]t is essential to the administration of the [NLRA] that these determinations be left in the first instance to the National Labor Relations Board." *Id.*

141. *Id.* at 244.

142. *Id.*

143. *Id.* at 246.

144. *Id.*

145. *See* Lesnick, *supra* note 121, at 470.

146. *See* Linn v. Plant Guard Workers Local 114, 383 U.S. 53 (1966).

147. *See* Farmer v. Carpenters Local 25, 430 U.S. 290 (1977).

148. In a concurring opinion in Taggart v. Weinacker's, Inc., 397 U.S. 223 (1970), for example, Chief Justice Burger indicated that he would allow the states to adjudicate trespass

Amalgamated Association of Streeet, Electric Railway & Motor Coach Employees v. Lockridge,[149] wherein a divided Court[150] held that a state court did not have jurisdiction over conduct arguably protected by section 7 or prohibited by section 8 of the NLRA. In *Lockridge*, state jurisdiction over activity arguably prohibited by the NLRA was held preempted, even though the state was acting pursuant to a law of general application.[151] But although it was clear that *Garmon* was still alive, the question of what constituted a local interest sufficient to allow adjudication of a labor dispute in a state court proceeding remained unanswered.

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actions arising from labor disputes. In his view, "any contention that the States are pre-empted in these circumstances is without merit. The protection of private property, whether a home, factory, or store, through trespass laws is historically a concern of state law. . . . Nothing in *San Diego Building Trades Council v. Garmon* . . . would warrant this Court to declare state-law trespass remedies to be ineffective and thus to remit a person to his own self-help resources if he desires redress for illegal trespassory picketing." *Id.* at 227-28 (Burger, C.J., concurring) (citations omitted). *See also* Justice White's concurring opinion in Longshoremen's Local 1416 v. Ariadne Shipping Co., 397 U.S. 195 (1970), in which Chief Justice Burger and Justice Stewart joined. Justice White concurred in the Court's decision that the Florida courts did not have jurisdiction over relations between the operators of foreign-flag vessels and the American longshoremen who work on those vessels while they are docked in American ports. However, he declared that he "would hold that only labor activity determined to be actually, rather than arguably, protected under federal law should be immune from state judicial control. To this extent [*Garmon*] should be reconsidered." *Id.* at 202 (White, J., concurring) (citations omitted).

149. 403 U.S. 274 (1971).

150. Justice Harlan delivered the opinion of the Court, in which Justices Black, Brennan, Stewart and Marshall joined. Dissenting opinions were filed by Justices Douglas, White (joined by Chief Justice Burger) and Blackmun.

151. 403 U.S. at 292. In *Lockridge*, a union member was suspended from his union and discharged from his job for failure to pay his union dues. The union's involvement in the member's loss of employment was either arguably protected by § 7 or prohibited by § 8 of the NLRA. Instead of filing a complaint with the NLRB, however, the member brought suit in a state court for breach of contract, claiming that the suspension in violation of the union's constitution and general laws constituted a breach by the union of its contract with the member. The trial court found for the member, awarded monetary damages for lost wages and ordered his reinstatement into the union. The Idaho Supreme Court affirmed the decision. 93 Idaho 294, 460 P.2d 719 (1969).

The United States Supreme Court reversed, holding that under *Garmon*, the arguably protected or prohibited nature of the union's conduct brought the matter within the exclusive jurisdiction of the NLRB. The Court noted that while it did not claim that the *Garmon* doctrine was without flaws, "we do think that it is founded on reasoned principle and that until it is altered by congressional action or by judicial insights that are born of further experience with it, a heavy burden rests upon those who would, at this late date, ask this Court to abandon *Garmon* and set out again in quest of a system more nearly perfect. A fair regard for considerations of *stare decisis* and the coordinate role of the Congress in defining the extent to which federal legislation pre-empts state law strongly support our conclusion that the basic tenets of *Garmon* should not be disturbed." 403 U.S. at 302.

B. The Sears *Case*

In *Sears*, the Court for the first time addressed the question of whether state courts have jurisdiction over an action for trespass when a labor union pickets the private property of an employer. In holding that a state court could exercise jurisdiction over such a case, the Supreme Court not only gave a new construction to the "arguably protected or prohibited conduct" limitation of state court jurisdiction established in *Garmon*, but also provided a new approach to *Garmon*'s "primary jurisdiction" rationale for preemption.[152]

The factual situation underlying the *Sears* litigation was straightforward.[153] The petitioner (Sears) owns a national chain of department stores. In 1973, business representatives of the San Diego County District Council of Carpenters (the union) discovered that certain carpentry work at Sears' Chula Vista, California, store was being done by carpenters who had not been dispatched from the union hiring hall.[154] On that same day, the union representatives met with the store manager and requested that Sears either see to it that union carpenters were used or sign an agreement to abide by the terms of the union's master labor agreement concerning the dispatch and use of carpenters.[155] After two days had passed without word from the Sears manager, the union established picket lines on Sears' property,[156] and picketing began in an orderly and peaceful manner.

The union refused to honor the store security manager's demand that the pickets be removed from Sears' property, stating that only legal action would force them to leave.[157] Accordingly, Sears sought an injunction in the California Superior Court, which entered a temporary restraining order enjoining the union from picketing on Sears' property; the union thereupon moved the pickets to the adjoining public sidewalks.[158] The superior court heard argument on the issue of whether state or federal law protected the union's picketing on Sears'

152. *See* notes 136-44 and accompanying text *supra*.

153. 436 U.S. at 182.

154. *Id.*

155. *Id.*

156. The Court described the location as follows: "The store is located in the center of a large rectangular lot. The building is surrounded by walkways and a large parking area. A concrete wall at one end separates the lot from residential property; the other three sides adjoin public sidewalks which are adjacent to the public streets. The pickets patrolled either on the privately owned walkways next to the building or in the parking area a few feet away." *Id.*

157. *Id.* at 182-83.

158. *Id.* The union ultimately concluded that this location was too far from the store, *see* note 156 *supra*, and discontinued the picket. 436 U.S. at 183 n.2.

property and subsequently issued a preliminary injunction.[159] The state court of appeal affirmed, holding that state court jurisdiction over the dispute was not preempted because the union's activity fell within the established exception for conduct touching interests deeply rooted in local feeling and responsibility.[160]

The union appealed to the California Supreme Court, which reversed the court of appeal decision.[161] The California court held that the *Garmon* doctrine was applicable because the picketing was arguably protected by section 7 of the Act.[162] The trespassory nature of the picketing did not disqualify it from protection under section 7; rather, this was a factor which the NLRB would consider in determining whether or not the activity was in fact prohibited. In addition, the California court found that the union's conduct was also at least arguably prohibited by the Act.[163] Thus, state court jurisdiction was precluded because the picketing fell within both the arguably protected and arguably prohibited branches of *Garmon*. In Feburary, 1977, the United States Supreme Court granted Sears' petition for certiorari.[164]

The *Sears* case was decided in May of 1978. Justice Stevens authored the majority opinion in the six-three decision.[165] The Court began its discussion of the legal issues involved by stating the two premises underlying its analysis: (1) The union's picketing on Sears' property after being requested to leave constituted a continuing trespass in violation of state law, and (2) the picketing was both arguably prohibited and arguably protected by federal law.[166] The Court then gave its formulation of the *Garmon* rule. It observed that as regards conduct that is clearly prohibited or protected by the Act, "due regard for the federal enactment requires that state jurisdiction must yield."[167] As to activity only arguably subject to section 7 or section 8 of the Act, the Court declared that it had not in the past supported an approach

159. The trial court held that the injunction was not prohibited by state law and that the picketing was not protected by either the First or Fourteenth Amendments. 436 U.S. at 183 n.3.

160. *Id.* at 183. *See* notes 145-47 and accompanying text *supra.*

161. 17 Cal. 3d 893, 553 P.2d 603, 132 Cal. Rptr. 443 (1976).

162. *Id.* at 898-99, 553 P.2d at 607-08, 132 Cal. Rptr. at 447-48.

163. *Id.* at 900-01, 553 P.2d at 609, 132 Cal. Rptr. at 449.

164. 430 U.S. 905 (1977).

165. 436 U.S. at 183-208. Chief Justice Burger and Justices White, Blackmun, Powell and Rehnquist joined in Justice Stevens' majority opinion. Justices Powell and Blackmun filed separate concurring opinions. Justice Brennan filed a dissenting opinion, in which Justices Stewart and Marshall joined.

166. *Id.* at 187.

167. *Id.* at 187 n.11.

that would preempt state jurisdiction without "careful consideration of the relative impact of such a jurisdictional bar on the various interests affected."[168] The determination of whether or not state power is precluded depends upon the nature of the particular interests being asserted and the effect that permitting the states to adjudicate labor disputes would have upon the administration of national labor policy.[169] The Court further stated that while its approach to "arguably prohibited" and "arguably protected" conduct involved some of the same considerations, the two categories differed in significant respects; thus, they would be treated separately within the discussion and analysis.[170]

Part IV of the majority opinion addressed the question of whether the arguable illegality of the picketing as a matter of federal law should preclude the state court from exercising jurisdiction over the trespass action. After a brief review of the history of the NLRA and some early cases holding that the states were without power to enforce rules that overlapped with that enactment, the Court focused on the 1953 case of *Garner v. Teamsters Local 776*.[171] In that case, peaceful organization picketing arguably violated section 8(b)(2) of the NLRA.[172] A Pennsylvania equity court enjoined the picketing because it violated the Pennsylvania Labor Relations Act.[173] The United States Supreme Court affirmed the Pennsylvania Supreme Court's reversal of that judgment, holding that because Congress had "taken in hand this particular type of controversy . . . [in] language almost identical to parts of the [state] statute,"[174] the state courts were without power to adjudge the same controversy and grant relief.[175]

The *Sears* Court construed *Garner* as holding that if conduct was arguably prohibited by the Act, state law would be preempted if two

168. *Id.* at 188. In a footnote, the Court attributed this sensitivity to the consequences of preemption to the manner in which the labor law preemption doctrine had evolved: "The doctrine is to a great extent the result of this Court's ongoing effort to decipher the presumed intent of Congress in the face of that body's steadfast silence . . . . And it is 'because Congress has refrained from providing specific directions with respect to the scope of pre-empted state regulation, [that] the Court has been unwilling to "declare pre-empted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers, and unions . . . ."'" *Id.* at 188 n.12 (quoting Farmer v. Carpenters Local 25, 430 U.S. 290, 295-96 (1977)).

169. *Id.* at 189. *See* Vaca v. Sipes, 386 U.S. 171, 180 (1967).

170. 436 U.S. at 190.

171. 346 U.S. 485 (1953).

172. 29 U.S.C. § 158(b)(2) (1976).

173. 43 PA. STAT. ANN. § 211.6 (Purdon 1952).

174. 346 U.S. at 488.

175. *Id.* at 501.

separate remedies were brought to bear on precisely the same activity;[176] the diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor disputes would run counter to the congressional goal of maintaining uniformity in the application of its substantive rules by means of a centralized administration of specially designed procedures.[177] The Court also noted its decision in *Farmer v. Carpenters Local 25* ,[178] wherein it held that a state court could adjudicate an action for the intentional infliction of emotional distress, even though the dispute also gave rise to an arguable violation of the federal act.[179] The Court distinguished *Farmer* from *Garner* by noting that in *Garner*, the controversy presented to the state court involved precisely the same issues that would be examined by the NLRB were an unfair labor practice charge filed with the Board.[180] In contrast, in *Farmer* the focus of the state court tort proceeding was on whether the union's conduct had caused its complaining member to suffer severe emotional distress and physical injury; the focus of an NLRB proceeding, on the other hand, would have been on whether the statements or conduct of the union officials discriminated or threatened discrimination against the member in employment referrals for reasons other than the member's failure to pay his union dues.[181] Because of these differences in the issues to be adjudicated in the state and federal proceedings, the exercise of state power in *Farmer* entailed little risk of interference with the Board's administration of national labor policy.

In determining whether the arguably prohibited status of any given conduct will preclude state jurisdiction, the *Sears* Court deemed the critical inquiry to be "whether the controversy presented to the state court is identical to (as in *Garner*) or different from (as in *Farmer*) that which could have been, but was not, presented to the Labor Board."[182] The Court stated that it is only in the first situation that a state court's exercise of jurisdiction necessarily entailed the risk of interference with federal labor policy that the *Garmon* doctrine was designed to avoid.[183] Applying these concepts to the facts in *Sears*, the Court concluded that the trespass controversy brought in the state court was not the same as

176. 436 U.S. at 193-94.
177. *Id.* at 192.
178. 430 U.S. 290 (1977).
179. 436 U.S. at 195-96.
180. *Id.* at 196-97 & n.25.
181. *Id.* at 195-97 & n.26.
182. *Id.* at 197.
183. *Id.* The Court noted that in the case of a special remedy under a state labor relations law, there is more of a chance that there will be an unacceptable intrusion upon federal labor policy. *Id.* at 197 n.27.

that which Sears might have presented to the Board.[184] The issue in a federal (Board) proceeding would have been whether the picketing had a recognitional or work reassignment objective. The state court adjudication merely required a finding as to whether or not a trespass had occurred—the location, not the objective of the picketing was the relevant issue in the state action. Accordingly, the Court concluded that permitting the state court to adjudicate the trespass claim would not create a realistic risk of interference with the Board's primary jurisdiction over violations of the NLRA.[185] The usual bases for federal preemption of state jurisdiction with respect to arguably prohibited conduct therefore did not exist in *Sears* and state jurisdiction over the trespass action was held permissible.[186]

In Part V of the majority opinion, the Court addressed the question of whether the arguably protected nature of the union's picketing provided a sufficient justification for preemption of the state court's jurisdiction. Justice Stevens began his discussion by noting that resolution of this issue involved somewhat different considerations than those pertaining to the regulation of arguably prohibited activity.[187] His analysis focused on two questions: (1) whether *Garmon*'s "primary jurisdiction" rationale[188] supported preemption in the instant case, and (2) whether the danger of state interference with federally protected conduct would preclude state jurisdiction over the case.

Justice Stevens considered the primary jurisdiction doctrine to be relatively unimportant in the context of the facts in *Sears*.[189] He stated that the primary jurisdiction rationale justified preemption "only in situations [involving protected conduct] in which an aggrieved party has a reasonable opportunity either to invoke the Board's jurisdiction himself or else to induce his adversary to do so."[190] In *Sears*, however, the employer did not have an acceptable method of invoking—or inducing the union to invoke—the jurisdiction of the NLRB. An employer cannot directly obtain a ruling by the Board as to whether a union's tres-

184. *Id.* at 198.
185. *Id.*
186. *Id.*
187. *Id.* at 199-200.
188. *See* notes 136-44 and accompanying text *supra.*
189. 436 U.S. at 200-03. Justice Stevens explained in a footnote that "primary jurisdiction" referred to the various considerations articulated in *Garmon* that lead a court to find state court jurisdiction preempted by the Board's jurisdiction over unfair labor practices. The term as used in *Sears* is not to be confused with the "primary jurisdiction" doctrine that allocates power between courts and agencies as to which body will make the initial decision on a particular issue. *Id.* at 199 n.29.
190. *Id.* at 201.

pass is federally protected; he must wait until the union files an unfair labor practice charge alleging interference with its right to picket peacefully. Therefore, if the union does not file such a charge, the employer has to resort either to self-help or bring an action for an injunction under state trespass laws. In the instant case, by demanding removal of the pickets Sears gave the union a chance to file an unfair labor practice charge, but the union chose to force Sears to seek an injunction. Thus, Sears pursued the only legal remedy available.[191] Since the issue of whether the union's conduct was protected under the NLRA was never raised before the Board, the *Sears* Court held that the primary jurisdiction rationale did not provide a sufficient justification for preemption.[192]

The next section of the majority opinion addressed the problem of state interference with federally protected conduct. To Justice Stevens, "the acceptability of 'arguable protection' as a justification for preemption in a given class of cases is, at least in part, a function of the strength of the argument that § 7 does in fact protect the disputed conduct."[193] The Court noted that in those cases in which it had held that state court jurisdiction to enforce local law was not preempted by the NLRA,[194] none of the violations of state law involved protected conduct.[195] In contrast, some violations of state trespass laws may actually be protected by section 7. The Court cited as an example *NLRB v. Babcock & Wilcox*,[196] wherein it held that in certain circumstances, nonemployee union organizers may have a limited right of access to an employer's premises to engage in organizational solicitation. Under *Babcock*, the employer has a right to bar nonemployee union organizers from its property unless the union carries the extremely heavy burden of showing that either the employer's access rules discriminate

191. The Court noted that Sears had two other options besides that of bringing the state court action. It could have either permitted the pickets to remain on its property or forcefully evicted them. Since the former would have allowed a violation of state law and since the latter entailed a risk of violence, the Court held that "[the primary jurisdiction] rationale does not extend to cases in which an employer has no acceptable method of invoking, or inducing the Union to invoke, the jurisdiction of the Board." *Id.* at 202.

192. *Id.* at 202-03.

193. *Id.* at 203.

194. *See* Farmer v. Carpenters Local 25, 430 U.S. 290 (1977) (intentional infliction of emotional distress); Linn v. Plant Guard Workers Local 114, 383 U.S. 53 (1966) (defamation); UAW v. Russell, 356 U.S. 634 (1958) (obstruction of access to private property); Youngdahl v. Rainfair, 355 U.S. 131 (1957) (state law prohibiting violence by striking employees); United Constr. Workers v. Laburnum, 347 U.S. 656 (1954) (law against violence), *cited in* 436 U.S. at 204 & nn.35-38.

195. 436 U.S. at 204.

196. 351 U.S. 105 (1956).

against union solicitation or there exists no other reasonable means of communicating with the employees.[197]

The Court in *Sears* reasoned that due to this heavy burden of showing that the trespassory conduct was protected under section 7, a union would probably invoke the Board's jurisdiction by filing an unfair labor practice charge only in situations wherein there is a strong argument for protection.[198] On the other hand, in cases where the union thought it had a weak argument for protection under the Act, state court jurisdiction would probably be invoked; the union could avoid an adverse ruling by the Board, force the employer to bring a state court action and then argue that state jurisdiction over the matter was preempted based on the protected nature of the conduct at issue.[199] Because it found that the state courts would receive only those cases in which the argument for protection was weak, the *Sears* Court reasoned that the risk of state courts enjoining a trespass actually protected under the Act would be minimized.[200] The Court concluded that this minimal risk of error by a state tribunal was outweighed by the effects of a rule which would deny the employer access to any forum in which to litigate either the trespass or the protection issues.[201] Accordingly, the Court declared:

> Because the assertion of state jurisdiction in a case of this kind does not create a significant risk of prohibition of protected conduct, we are unwilling to presume that Congress intended the arguably protected character of the Union's conduct to deprive the California courts of jurisdiction to entertain Sears' trespass action.[202]

197. *Id.* at 112.

198. 436 U.S. at 206-07. In his dissenting opinion, Justice Brennan disputed the majority's assessment of the likelihood of the Board finding trespassory picketing to be protected. He noted that the trespass in *Babcock* was on industrial property and interfered with the employer's business. In contrast, the picketing in *Sears* was peaceful, nonobstructive and took place on a parking lot open to the public. In Justice Brennan's view, the trespass in *Sears* would therefore probably be considered protected. *Id.* at 230-32 (Brennan, J., dissenting). *See* Hudgens v. NLRB, 424 U.S. 507, 521-23 (1975).

199. 436 U.S. at 207. In his dissenting opinion, Justice Brennan questioned this conclusion. He stated that the union's decision whether or not to invoke the jurisdiction of the Board would depend upon tactical considerations and not merely on its assessment of the strength of its arguments as suggested by the majority. *Id.* at 232 (Brennan, J., dissenting).

200. *Id.* at 206-07.

201. *Id.*

202. *Id.* at 207. In a footnote, Justice Stevens stated that it was critical to the Court's holding that Sears had demanded that the union discontinue the trespassory picketing before it initiated the state court action. Because the NLRB had earlier taken the position that the mere resort to court action does not constitute an unfair labor practice, *see* NLRB v. Nash-Finch Co., 404 U.S. 138, 142 (1971), the reasoning in *Sears* is applicable only in situations where the employer had demanded discontinuation of the trespass. If the employer

The effect of *Sears* on the labor law preemption doctrine is unclear. The Court's approach to arguably protected conduct, balancing the risk of state court error against the employer's interest in having a forum,[203] was a departure from *Garmon*'s relatively absolute rule barring state regulation of protected conduct.[204] In a strongly worded dissent,[205] Justice Brennan accused the Court of bringing about a "drastic abridgement of established principles" that was "unjustified and unjustifiable."[206] Pointing out that the *Garmon* test had provided stability and predictability for nearly twenty years, the dissenting Justice declared that "the most elementary notions of *stare decisis* dictate that the test be reconsidered only upon a compelling showing, based on actual experience, that the test disserves important interests."[207] Justice Brennan stated that such a showing had not and could not be made; he viewed the *Garmon* test as embodying the best possible accomodation between the competing state and federal interests.[208]

Justice Brennan also noted that the *Sears* exception to the *Garmon* rule created a situation entailing a risk that the Court had been trying to avoid over the past few decades—the risk of state court interference with the administration of national labor policy.[209] This point was well-taken, as the reasoning of the *Sears* decision does appear to run counter to concerns expressed repeatedly by the Court in the past. The main thrust behind the labor law preemption cases has been to avoid unlimited, possibly inconsistent, adjudications by state and federal courts of matters subject to regulation by the Board.[210] Although the Court has carefully carved out exceptions to the Board's exclusive jurisdiction,[211] the *Sears* Court did not strictly limit the parameters of its

were not required to make such a demand, the union would be deprived of its opportunity to invoke the Board's jurisdiction. 436 U.S. at 207-08 n.44. The Court thus recognized both the employer's and the union's need for a forum in which to air their grievances.

203. *See* note 201 and accompanying text *supra.*

204. *See* notes 136-44 and accompanying text *supra.*

205. 436 U.S. at 214 (Brennan, J., joined by Stewart & Marshall, JJ., dissenting).

206. *Id.* at 216.

207. *Id.*

208. *Id.* In Justice Brennan's opinion, the fact that an employer's remedies may be limited produces no social harm. He stated that, "on the contrary, the limitation on employer remedies is fully justified both by the ease of application of the test by thousands of state and federal judges and by its effect of averting the danger that state courts may interfere with national labor policy." *Id.*

209. *Id.* at 216-17.

210. *See* Motor Coach Employees v. Lockridge, 403 U.S. 274, 285-89 (1971); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 239-45 (1959); Garner v. Teamsters Local 776, 346 U.S. 485, 490-91 (1953).

211. *See, e.g.*, Farmer v. Carpenters Local 25, 430 U.S. 290 (1977) (intentional infliction of emotional distress); Linn v. Plant Guard Workers Local 114, 383 U.S. 53 (1966) (mali-

holding.[212] Consequently, there is a substantial likelihood of much litigation attempting to refine the balancing/accommodation approach established in *Sears* to determine whether state court jurisdiction is appropriate in a given situation.

The disagreement reflected in the majority and dissenting opinions appears to rest on a difference in their respective appraisals of the practical effect of *Sears* on the lower courts. Both the majority and Justice Brennan balanced the interest of the employer in having a remedy for potentially illegal union conduct against the societal interest in maintaining a uniform national labor policy. The majority found it relatively unlikely that protected conduct would be infringed upon and believed that this justified the added protection given to employers.[213] In contrast, Justice Brennan acknowledged that the employer would be denied a remedy, but found this to be "an entirely acceptable social cost for the benefits of a pre-emption rule that avoids the danger of state-court interference with national labor policy."[214]

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cious libel); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959) (conduct touching interests deeply rooted in local feeling and responsibility); UAW v. Russell, 356 U.S. 634 (1958) (mass picketing and threats of violence); Machinists v. Gonzales, 356 U.S. 617 (1958) (activity merely a peripheral concern of the NLRA).

212. *See* 436 U.S. at 234-37 (Brennan, J., dissenting).

213. *See* notes 198-202 and accompanying text *supra*. For another argument in favor of holding the state courts a proper forum for employers, see Justice Blackmun's concurring opinion, 436 U.S. at 208-12 (Blackmun, J., concurring). He agreed with the majority that where the union failed to file an unfair labor practice charge against the employer after being asked to leave its premises, preemption was inappropriate since the employer would then be deprived of any forum in which to resolve either the trespass or the protection issue. *Id.* at 209. Thus, there would be a "no-man's land" situation entailing the possibility of an employer's resort to violence. *Id.* at 208.

Justice Blackmun emphasized, however, that the logical corollary to the majority's reasoning was that if the union did file a charge with the NLRB after being asked to leave the employer's property, it could continue to picket; state court jurisdiction would be preempted until either the NLRB held the picketing to be unprotected or the General Counsel declined to issue a complaint. *Id.* at 209. Such a course of union conduct could indefinitely frustrate an employer's attempt to stop picketing on its property, causing economic damage brought about by possibly illegal activity on the part of the union.

For a contrary view of the likelihood of violence arising from an employer's lack of a forum, see Justice Brennan's dissent, *id.* at 214-37, wherein he stated that "any suggestion that the faithful application of *Garmon* creates a 'no-man's land' which results in a substantial risk of violence . . . can be dismissed as the most unfounded speculation . . . . There is simply no basis whatsoever for a conclusion that the risk of violence is any greater when an employer is told by a state court that *Garmon* bars his state trespass action than when he is told either that § 7 protects picketing on a public area immediately adjacent to his business, . . . or that § 7 in fact privileges the entry onto his property." *Id.* at 227-28 (Brennan, J., dissenting) (citations omitted).

214. *Id.* at 227. Justice Brennan's appraisal of the propriety of denying the employer a remedy was based on his belief that where the picketing is peaceful and nonobstructive, the

The dissent is convincing in its appraisal of the chance of inconsistency in the application of the *Sears* exception to the general rule of preemption. Justice Brennan pointed out that state courts adjudicating trespass actions arising from arguably protected picketing would have to address exceedingly complex labor law issues that had heretofore been uniquely within the province of the Board.[215] Such a court initially would have to assess the relative strength of the section 7 right[216] by characterizing the picketing as either prohibited or protected.[217] Given the complexity of the factual and legal determinations involved in such a characterization, as well as state courts' lack of expertise in and sensitivity to labor relations matters, Justice Brennan found there to be a "substantial danger" that a state court would enjoin picketing entitled to protection under the Act.[218] The court would also have to make a number of factual inquiries to determine whether the trespass was protected by section 7.[219] In Justice Brennan's view, "[i]t simply cannot be seriously contended that the thousands of judges, state and federal, throughout the United States can be counted upon accurately to identify the relevant considerations and give each the proper weight in accommodating the respective rights."[220]

The final section of Justice Brennan's dissent addressed the problems inherent in the application of the *Sears* reasoning to different

employer's interest in preventing the picketing is weak and the § 7 interest in picketing on the employer's property is strong. *Id.* He found the § 7 interest to be strong because the object of picketing was arguably protected as either area standards or recognitional picketing and because its relocation diluted its impact to the point of virtual ineffectiveness. He found the private property interest to be weak because the picketing was confined to an area open to the public where Sears permitted solicitation by other groups; thus, Sears' private property in reality resembled public property. *Id.* at 225-26.

215. *Id.* at 230.

216. *Id.* (citing NLRB v. Hudgens, 424 U.S. 507, 522 (1975)).

217. *Id.* at 229.

218. *Id.*

219. *Id.* at 229-30. These factual inquiries would include whether and to what extent relocating the picketing would dilute its impact, whether the picketing was recognitional or area standards, whether or to what extent the employer had opened up the property to the public, and the importance of whether the picketers were actually employees. Justice Brennan stated that, if relevant, these types of inquiries would also suggest a number of subsidiary questions. *Id.*

220. *Id.* at 230. Justice Brennan pointed out that the manner in which the California Superior Court and Court of Appeal had handled the case indicated that a careful consideration of all the relevant issues had been precluded. The Superior Court entered an *ex parte* order and apparently did not even consider the federal labor law issues implicit in enjoining picketing arguably protected by the NLRA. *See id.* at 183 n.3 (majority opinion). Moreover, the court of appeal failed to take into account the significance of the location of the picketing, a criterion critical to the proper application of federal law. *Id.* at 230 (Brennan, J., dissenting).

generic situations. He envisioned state and federal courts applying the *Sears* analysis whenever an employer has requested that a labor organization cease allegedly unprotected conduct and the union fails to respond by filing an unfair practices charge.[221] A court in this situation initially would have to determine whether the employer had a reasonable opportunity to invoke the Board's jurisdiction. In Justice Brennan's view, the *Sears* Court had adopted this "reasonable opportunity" test without defining what constituted such an opportunity.[222] If the employer was found incapable of invoking the Board's jurisdiction, the court would have to decide whether there was a substantial likelihood that its judgment would be incompatible with the national labor policy. Justice Brennan predicted that judges with no special expertise in federal labor law would undoubtedly err in resolving this issue.[223] Finally, the court would have to determine whether the anomaly of denying an employer a remedy outweighed the risk of an erroneous determination. Justice Brennan stated that the range of circumstances which might lead a court to find in favor of the employer's interest was "limitless."[224] He therefore concluded that "[t]he Court's new exception to *Garmon* cannot be expected to be correctly applied by those [lower] courts and thus most inevitably will threaten erosion of the goal of uniform administration of the national labor laws."[225]

The *Sears* opinion will undoubtedly spark an increase in litigation involving the question of the extent of state court jurisdiction over labor law disputes. The Court established a rule with respect to a state tribunal's jurisdiction over a private property trespass action, but it is unclear how much of the Court's reasoning is applicable to and can be expanded to cover other violations of state law. It is also difficult to predict whether adjudications by state courts will actually prove to interfere only minimally with a uniform federal labor policy. *Sears* could be the seminal decision in a new line of labor law preemption cases that grant more power to the states and show declining deference to the expertise and almost exclusive jurisdiction of the National Labor Relations Board.

221. *Id.* at 235.

222. *Id.*

223. *Id.* at 235-36: "It is not clairvoyant to predict that many local tribunals will misconceive the relevant criteria and erroneously conclude that they are capable of correctly applying the labor laws."

224. *Id.* at 236.

225. *Id.* at 234.

II. *Malone v. White Motor Corp.*

The Supreme Court's decision in *Malone v. White Motor Corp.*,[226] the other labor law preemption case decided during the October 1977 Term, was much less controversial than that in *Sears*. In *Malone*, the Court applied the traditional preemption analysis[227] and examined the legislative history of the relevant federal act to determine the implied intent of Congress. The members of the Court did not disagree on the approach to be utilized; rather, the dissenting Justices differed from those joining in the plurality opinion[228] in respect to their interpretation of the underlying congressional intent.

The factual background of the *Malone* litigation was rather complex.[229] White Motor Corporation operated farm equipment manufacturing plants in Hopkins and Minneapolis, Minnesota. The employees at these plants, represented since 1955 by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), were covered by a pension plan (Plan) established in 1950 through collective bargaining. This plan had been carried forward through each of the subsequent years in which collective bargaining agreements were negotiated. The 1971 version of the Plan provided that any employee who attained the age of forty and completed ten or more years of credited service with the company was entitled to a pension, the amount of which would depend upon the employee's age at the time of his or her retirement. Since its establishment, the Plan had specifically provided that these pensions would be payable only from a fund established for that purpose and that rights to pensions would be enforceable only against that fund. The Plan was funded on a deferred basis: the unpaid past service liability—the excess of the accrued liability above the present value of the fund's assets—was to be met through contributions by the employer derived from its continuing business operations.

One section of the Plan provided that White would have the sole right to terminate the entire plan at any time. During the 1968 and 1971 negotiations with the UAW, however, White gave pension plan guarantees providing that upon termination of the Plan, benefits of a

226. 435 U.S. 497 (1978).

227. *See* notes 136-44 and accompanying text *supra*.

228. *Malone* was a four-three decision, since Justices Brennan and Blackmun took no part in the consideration or decision of the case. Justice White wrote the plurality opinion of the Court, in which Justices Marshall, Rehnquist and Stevens joined. Justices Stewart and Powell both filed dissenting opinions, in which Chief Justice Burger joined.

229. 435 U.S. at 499-503.

specified amount would be given to those persons entitled to pensions. By extending these guarantees, White assumed a direct liability for pension payments of approximately $7,000,000 above the fund's assets. Between the years 1969 and 1972, White suffered substantial losses, particularly in its Minneapolis operations. Consequently, in May of 1974, White exercised its contractual right to terminate the pension plan. As of January 1, 1975, there were 981 retirees under the Plan and 233 persons eligible for deferred pensions.

A few weeks before White terminated the Plan, the State of Minnesota had enacted the Private Pension Benefit Protection Act (Pension Act).[230] This statute imposed a "pension funding charge" directly against any employer who had ceased to operate either a place of employment or a pension plan.[231] Pursuant to the Pension Act, the Commissioner of Labor and Industry of the State of Minnesota undertook an investigation of White's pension plan and certified that the sum necessary to achieve compliance with the Act was $19,150,053;[232] under the Pension Act, this amount became a lien on White Motor Corporation's assets.[233] White promptly filed a suit in federal district court, challenging the constitutionality of the Pension Act on the grounds that it violated the supremacy clause, the contract clause and the due process and equal protection clauses of the Fourteenth Amendment.[234] White's supremacy clause claim was based on the argument that the Pension Act was preempted because it conflicted with several provisions of the National Labor Relations Act (NLRA).[235] Specifically, White argued that the Act interfered with the company's right to bargain collectively and that it impermissibly modified collective-bargaining agreements entered into pursuant to the NLRA by imposing upon

230. MINN. STAT. ANN. §§ 181B.01-.12 (West Cum. Supp. 1978).

231. *Id.* § 181B.03-.06. According to the Act, the charge was to be equal in amount to the vested benefits described in the statutory provisions.

232. 435 U.S. at 502. The Pension Act provided that the Commissioner, after investigation, should certify the amounts owing by the employer. MINN. STAT. ANN. § 181B.09-.12 (West Cum. Supp. 1978).

233. 435 U.S. at 502. *See* MINN. STAT. ANN. § 181B.11 (West Cum. Supp. 1978).

234. The district court resolved only the supremacy clause issue, stating that where a statute is challenged both on preemption and other constitutional grounds, the preemption issue should be decided first. White Motor Corp. v. Malone, 412 F. Supp. 372, 376 (D. Minn. 1976) (citing Hagans v. Lavine, 415 U.S. 528 (1974)).

235. *Id.* at 377. *See* 29 U.S.C. §§ 151, 157, 158(a)(5), (b)(3), (d) (1976). Section 7 of the NLRA establishes the right of employees to form and join labor organizations and to bargain collectively through representatives of their own choosing. *Id.* § 157. Sections 8(a)(5), (b)(3), and (d) generally require employers and labor organizations to bargain in good faith. *Id.* §§ 158(a)(5), (b)(3), (d).

White obligations that the agreements expressly made optional.[236] On the basis of its preemption claim, White moved for partial summary judgment or for a preliminary injunction.[237]

The district court denied the requested relief, holding that the Pension Act was not preempted by the NLRA.[238] The court initially held that the NLRA does not regulate the substantive terms of a collective bargaining agreement,[239] and that the *Garmon* doctrine[240] was therefore not implicated by the Pension Act.[241] After examining the legislative history of the applicable federal statute, the Welfare and Pension Plans Disclosure Act[242] (Disclosure Act), the court determined that Congress did not intend to preempt state laws regulating pension plans, even those that were the product of collective bargaining.[243]

The final section of the district court opinion involved an analysis of the Supreme Court's decision in *Local 24, Teamsters Union v. Oliver*.[244] In *Oliver*, a collective bargaining agreement between labor unions and a group of interstate motor carriers provided that drivers who owned and drove their own vehicles would be paid at least a designated minimum rental for the use of their trucks, in addition to the prescribed wage.[245] Suit was filed in state court, seeking to enjoin certain carriers and a local union from complying with the minimum rental provision. The state court held that the collective bargaining agreement violated a state antitrust law.[246] The Supreme Court held that since the challenged provision was part of an agreement concerning wages resulting from the exercise of collective bargaining rights granted by the NLRA,[247] the state was precluded from applying its antitrust law as a basis for an injunction.[248] Although the Court inti-

236. 412 F. Supp. at 377.

237. *Id.* at 373.

238. *Id.* at 382.

239. *Id.* at 379 (citing NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 402 (1952)).

240. *See* notes 121-44 and accompanying text *supra*.

241. 412 F. Supp. at 379: "The state is not attempting to regulate a subject matter which lies within the exclusive competence of the National Labor Relations Board." *Id.*

242. 29 U.S.C. §§ 301-309 (1976). This act was the controlling federal pension statute in effect when Minnesota's Pension Act was adopted. Subsequent to the enactment of the Pension Act, Congress passed the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1031 (1976), which expressly superseded any state laws regulating pension funds and employee benefit plans. ERISA did not take effect, however, until January 1, 1975, after the events leading to the *Malone* litigation had taken place.

243. 412 F. Supp. at 380-81.

244. 358 U.S. 283 (1959).

245. *Id.* at 287.

246. OHIO REV. CODE ANN. § 1331.01 (Page Supp. 1977).

247. 358 U.S. at 292-95.

248. *Id.* at 295-97. The Court determined that the primary congressional purpose behind

mated that it might have reached a different result were the state law in question a local health or safety regulation, it pointed out that the antitrust law sought "specifically to adjust relationships in the world of commerce,"[249] and that it was for Congress to determine whether there should be any limitation on the types of provisions includable in collective bargaining agreements.[250]

The district court found *Oliver* inapposite, declaring that "[s]tate antitrust statutes present unique problems in the area of labor preemption. The Supreme Court has consistently held that the NLRA precludes their application to appropriate labor union activities."[251] The inherent conflict between labor law and antitrust policy was found not to exist between labor policy and the regulation of pensions.[252] Since Congress indicated that the states could regulate pensions, *Oliver* did not require the invalidation of the Pension Act.[253]

The court of appeals reversed the district court decision in *Malone*,[254] holding that federal labor policy precluded the state from imposing upon the employer any obligations contrary to the collective bargaining agreement entered into by that employer and the employee's union. Thus, White could not be forced to fund completely its employee pension plan upon its termination since the agreement provided that the pensions were to be paid solely from the fund.[255] Noting that pension plans are mandatory subjects of bargaining under the NLRA,[256] the court further stated that the states could not regulate the substantive terms of collective bargaining agreements by regulating the conduct of the parties to the agreement.[257] The court of appeals also disagreed with the trial court's interpretation of *Oliver*.[258] The court

establishment of a federal labor policy was to promote collective bargaining. *Id.* at 295. Application of the Ohio antitrust law would wholly defeat the full realization of that purpose. *Id.* at 295-96. Congress did not intend to regulate the substantive terms of labor agreements. Because application of the state law would frustrate that intent by limiting the solutions that the parties' agreement could provide in regard to wages and working conditions, state jurisdiction to apply that law was held precluded. *Id.* at 296.

249. *Id.* at 297.

250. *Id.*

251. 412 F. Supp. at 381 (citing Connell Constr. Co. v. Plumbers Local 100, 421 U.S. 616 (1975); Weber v. Anheuser-Busch, Inc., 348 U.S. 468 (1955)).

252. *Id.* at 381.

253. *Id.*

254. 545 F.2d 599 (8th Cir. 1976).

255. *Id.* at 609-10.

256. *Id.* at 604 (citing Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949)).

257. *Id.* at 606. The court relied on Lodge 76, Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976).

258. 545 F.2d at 607. *See* notes 244-53 and accompanying text *supra*.

did not read *Oliver* so restrictively; rather, it stressed that other cases had cited *Oliver* for "the general proposition that a state cannot modify or change an otherwise valid and effective provision of a collective bargain agreement."[259] Finally, the court determined that the legislative history of the Disclosure Act emphasized the limited purpose of that federal enactment; the Act was not intended to effect the substantive terms of any employee benefit plans.[260] The preemption disclaimer relied on by the lower court[261] was found to encompass only those state laws regulating employee benefit fund trustees. Accordingly, the states were without power to change the substantive provisions of pension plan agreements.[262]

The Supreme Court reversed, upholding the district court's decision on the issue of preemption.[263] Justice White, writing for the Court in the four-three decision,[264] began his discussion by summarizing the Court's preemption analysis. He stated that it was "uncontested that whether the Minnesota statute is invalid under the Supremacy Clause depends on the intent of Congress."[265] He further observed that Congress did not always clarify its intent within the legislation itself; in those cases, a local law was usually sustained unless it conflicted with federal law or policy, or unless the Court could ascertain a congressional intent to occupy the field to the exclusion of the states.[266]

Applying these concepts to the instant case, the Court first stated that nothing in the NLRA expressly foreclosed all state regulatory

259. 545 F.2d at 608 (citing Lodge 76, Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 153 (1976); NLRB v. Insurance Agents, 361 U.S. 477, 488 (1960).

260. *Id.* The court of appeals quoted a section of a Senate Report that read in part: "Complete disclosure of the details of welfare and pension plan operations provides the most effective single deterrent against abuses and the many other weaknesses of these plans. It would provide the greatest incentive to good management and investment policies and the best protection to the interests and rights of employees, employers, and the Government alike." *Id.* (citing S. REP. No. 1940, 85th Cong., 2d Sess., *reprinted in* [1958] U.S. CODE CONG. & AD. NEWS 4153.

261. *See* notes 242-43 and accompanying text *supra.*

262. 545 F.2d at 609.

263. 435 U.S. at 515. The Court's holding was limited to the preemption issue. The case was remanded to the district court for consideration of the appellee's contentions that the Minnesota statute impaired contractual obligations and violated the due process clause of the federal constitution. *Id.* at 514-15. For the ultimate outcome of the *Malone* litigation, see note 288 *infra.*

264. For a summary of the Court's votes and abstentions, see note 228 *supra.*

265. 435 U.S. at 504 (citing Retail Clerks v. Schermerhorn, 375 U.S. 96, 103 (1963) ("[t]he purpose of Congress is the ultimate touchstone")).

266. *Id.* (citing Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978); Jones v. Rath Packing Co., 430 U.S. 519 (1977); Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947)).

power concerning pension plans.[267] The Court noted that one indicium of congressional intent could be found in the Disclosure Act preemption disclaimer, which was relied upon by the district court and found inapposite by the court of appeals.[268] In addition, another section of the Act emphasized that other state laws remained unaffected: "Nothing contained in this subsection shall be construed to prevent any state from attaining such additional information relating to any such plan as it may desire, or from otherwise regulating such plan."[269]

Disagreeing with the court of appeals,[270] the Supreme Court interpreted these provisions as indicating that Congress intended to preserve state authority to regulate pension plans, "including those plans which were the product of collective bargaining."[271] Justice White pointed out that the federal statute did not prescribe any substantive rules; the Senate Report stated, "the legislation proposed is not a regulatory statute. It is a disclosure statute and by design endeavors to leave regulatory responsibility to the States."[272] The report further explained that the statute was designed "to leave to the States the detailed regulations relating to insurance, trusts and other phases of their operations."[273] The Court's analysis of the legislative history drew upon the Senate and House Reports and the floor discussions,[274] all of which pointed toward the Court's conclusion that Congress intended that the substantive standards for employee pension plans, even those which were the product of collective bargaining, be established by the states.[275]

After ascertaining the controlling congressional intent, the Court declared that its conclusion was consistent with its decision in *Oliver*.[276] The *Malone* Court construed *Oliver* as "affirming the independence of the collective-bargaining process from state interference."[277] However, the Court also noted that *Oliver* recognized exceptions to the general

267. *Id.* at 505-06.

268. *Id.* *See* notes 242-43 & 262 and accompanying text *supra*.

269. 435 U.S. at 505. *See* 29 U.S.C. § 310(a) (1976).

270. *See* note 262 and accompanying text *supra*.

271. 435 U.S. at 505.

272. *Id.* at 507 (quoting S. REP. No. 1465, 85th Cong., 2d Sess. 18 (1958)).

273. S. REP. No. 1465, 85th Cong., 2d Sess. 19 (1958). The report also noted that "a disclosure statute which is administered in close cooperation with the States could also be of great assistance to the States in carrying out their regulatory functions." *Id.* at 18.

274. *See* S. REP. No. 1465, 85th Cong., 2d Sess. 4, 8, 14 (1958); H.R. REP. No. 2283, 85th Cong., 2d Sess. 9 (1958). *See also* 104 CONG. REC. 16420 (1958) (remarks of Rep. Lane); *id.* at 16425 (remarks of Rep. Wolverton); *id.* at 7049-7052 (remarks of Sen. Kennedy).

275. 435 U.S. at 510.

276. *Id.* at 512. *See* notes 244-50 and accompanying text *supra*.

277. 435 U.S. at 513. The Court referred to the language in *Oliver* that stated: "We believe that there is no room in this scheme for the application here of this state policy

rule. Where Congress did not intend to preempt state jurisdiction, state regulatory power is permitted to coexist with the federal scheme.[278] Based on his analysis of the legislative history and congressional intent underlying the Disclosure Act,[279] Justice White declared that *Malone* presented such a situation.[280] It therefore fit within the exception outlined in *Oliver* and the Minnesota Act was not preempted by federal law.[281]

Three justices dissented.[282] Justice Stewart wrote a brief opinion in which he declared that he substantially agreed with the court of appeals' reasoning.[283] He did not think that a congressional intent to permit state regulation should be implied from Congress' failure to undertake substantive regulation of pension plans when it enacted the Disclosure Act.[284] Justice Powell joined in that conclusion, stating that evidence as to what Congress did not do in the Act was "insufficient to override national labor policy banning interference by the States with privately negotiated solutions to problems involving mandatory subjects of collective bargaining."[285] He viewed *Oliver* as granting an exemption from the general rule of preemption only when local health or safety regulations conflict with the collective bargaining agreements at issue.[286] Because such a situation did not exist in *Malone*, *Oliver* was inapplicable and the strong federal labor policy required preemption in the absence of a congressional intent to the contrary.[287]

The *Malone* decision did not establish any new inroads in federal labor law preemption aside from its arguably new interpretation of *Oliver*. The Court's approach was straightforward; it examined the debates and other legislative history of the Disclosure Act in an attempt to ascertain the congressional intent with regard to employee pension plans. Although the Justices disagreed as to the proper interpretation

limiting the solutions that the parties' agreement can provide to the problems of wages and working conditions." Id. (quoting Local 24, Teamsters Union v. Oliver, 358 U.S. at 296).

278. *Id. See* Local 24, Teamsters Union v. Oliver, 358 U.S. at 296.

279. *See* notes 268-75 and accompanying text *supra*.

280. 435 U.S. at 514.

281. *Id.* The Court also mentioned briefly the equitable considerations arising from the application of the Pension Act to a previously negotiated collective bargaining agreement. It stated that the claim of unfair retroactive impact could be considered by the district court on remand. *Id.* at 514-15.

282. Justices Stewart and Powell filed dissenting opinions. Chief Justice Burger joined in each of those opinions.

283. 435 U.S. at 515-16. *See* notes 254-62 and accompanying text *supra*.

284. 435 U.S. at 515 (Stewart, J., dissenting).

285. *Id.* at 516 (Powell, J., dissenting).

286. *Id.* at 517.

287. *Id.* at 517-18.

of the legislative history, none of them appeared to question the Court's mode of preemption analysis in labor law cases. In light of this basic consensus, the *Malone* opinion may be significant primarily to the parties involved.[288]

COMMERCE CLAUSE

I. *Raymond Motor Transportation, Inc. v. Rice*

In *Raymond Motor Transportation, Inc. v. Rice*,[289] the Supreme Court was once again forced to resolve a traditional commerce clause problem: the Constitution's negative implications concerning state regulations which somehow burden interstate commerce.[290] Two of the parties to the litigation, appellants Raymond Motor Transportation, Inc., and Consolidated Freightways Corporation of Delaware, are common carriers of general commodities with primary interstate routes through the State of Wisconsin.[291] Both Raymond and Consolidated use two different types of trucks. One consists of a three-axle tractor that pulls a single two-axle, forty-foot trailer. This single-trailer unit (single), with an overall length of fifty-five feet, has been used on the nation's highways for many years and is an industry standard. The other type of truck used consists of a two-axle tractor that pulls two single-axle trailers. Each such trailer is twenty-seven feet long, resulting in a double-trailer unit (double) with an overall length of sixty-five feet. The double has come into increasing use in recent years and is thought to have certain advantages over the single for general commodities shipping.[292]

Although most states permit the operation of sixty-five foot doubles on their interstate highways and access roads, Wisconsin law generally does not allow trucks longer than fifty-five feet to be operated on highways within that state. The key statutory provision, Wisconsin Statutes section 348.07(1),[293] sets a limit of fifty-five feet on the overall

288. Although White Motor's preemption challenge to the Pension Act failed, that statute was subsequently held to violate the contract clause in Allied Structural Steel Co. v. Spannaus, 98 S. Ct. 2716 (1978).

289. 434 U.S. 429 (1978).

290. *See generally* L. TRIBE, *supra* note 30, at 319-44.

291. Raymond's primary interstate route is between Chicago and Minneapolis; it does not serve any points in Wisconsin. Consolidated operates nation-wide, providing service in 42 states, including Wisconsin. 434 U.S. at 431.

292. For example, a double can carry a greater volume of general commodities than a single, often without exceeding legal limits on gross vehicle weights. Because fewer doubles than singles are needed to carry a given amount of cargo, there is a savings in fuel and driver time. *Id.* at 432 n.2.

293. WIS. STAT. § 348.07(1) (1975). Subsequent to the district court's decision upholding

length of a vehicle pulling one trailer; anyone wishing to operate a single-trailer unit of greater length must obtain a permit from the State Highway Commission. Wisconsin Statutes section 348.08(1) provides that no vehicle pulling more than one other vehicle shall be operated on a state highway without such a permit.[294] In addition to being authorized to issue various classes of annual permits for the operation of vehicles not conforming to the statutory standards, the State Highway Commission may "impose such reasonable conditions" and "adopt such reasonable rules" of operation with respect to vehicles operated under permit "as it deems necessary for the safety of travel and protection of the highways."[295] The Commission had issued administrative regulations describing the conditions under which "trailer train" and other classes of permits would be issued. Although it is authorized to grant "trailer train" permits for the operation of double-trailer units,[296] in practice the Commission limited such permits to intrastate carriers.[297]

The *Raymond* litigation arose when Raymond and Consolidated each applied to the appropriate Wisconsin officials for annual permits to operate sixty-five foot doubles on interstate highways running through the state. The permits were denied because neither of the carriers' proposed operations were within the narrow scope of the Commission's administrative regulations specifying when such permits would be issued. The carriers thereupon filed suit in federal district court seeking declaratory and injunctive relief, claiming that the regulations barring the proposed operation of doubles burdened and discriminated against interstate commerce in violation of the commerce clause.[298] Specifically, the complaint alleged that Wisconsin's refusal to issue the permits disrupted and delayed the carriers' transportation of goods in interstate commerce. The complaint further alleged that sixty-five foot doubles were as safe as, if not safer than, the fifty-five foot singles whose operation was allowed without permits. Moreover, the statutory and administrative exceptions to the general prohibition

its constitutionality, this section was amended to allow "singles" up to 59 feet to be operated without a permit if the truck tractor and cargo space of the semi-trailer were within certain statutory limits. 1977 Wis. Laws, ch. 29, § 1487h, adding § 348.07(2)(g). *See* Raymond Motor Transp., Inc. v. Rice, 434 U.S. at 432 n.3.

294. WIS. STAT. § 348.08(1) (1975).

295. WIS. STAT. § 348.25(3) (1975). *See* Raymond Motor Transp., Inc. v. Rice, 434 U.S. at 433-34.

296. WIS. STAT. § 348.27(6) (1975).

297. WIS. AD. CODE § HY. 30.14(3)(a) (1975). *See* Raymond Motor Transp., Inc. v. Rice, 434 U.S. 433-34 & n.5.

298. U.S. CONST. art. I, § 8, cl. 3.

were claimed to result in permits being issued to carriers whose vehicles were indistinguishable from those used by Raymond and Consolidated.

The case was heard by a three-judge district court.[299] The carriers presented a substantial amount of evidence supporting their contention that doubles were as safe as singles, including testimony from the Deputy Director of the Bureau of Motor Carrier Safety, Federal Highway Administration, United States Department of Transportation,[300] various highway safety experts and highway safety officials from twelve different states. The evidence adduced by these experts demonstrated that doubles were safer because of their greater maneuverability, more even distribution of loads, better braking capability, lesser capacity for jackknifing, and lower production of splash and spray, which obscures the vision of drivers in following and passing vehicles.[301] The experts also agreed that the difference in the amount of time needed to pass a fifty-five foot single and a sixty-five foot double had no appreciable effect on motorist safety on limited-access, four-lane divided highways.[302]

In contrast to the overwhelming showing as to relative safety made by the carriers, the state made no effort to contradict any of that evidence with its own evidence.[303] Moreover, the Chairperson of the State Highway Commission stated that the regulations prohibiting the issuance of permits to the carriers were not based on any administrative assessment of the safety of sixty-five foot doubles. Rather, the Commission adopted the regulations based on a belief that Wisconsin residents did not want vehicles over fifty-five feet long on the state's highways.[304] The state failed to produce any evidence at all to suggest or prove that sixty-five foot doubles were less safe than fifty-five foot singles; indeed, the state agreed that the carriers had shown that "65

299. 417 F. Supp. 1352 (W.D. Wis. 1976) (*per curiam*). The three-judge court was convened pursuant to 28 U.S.C. § 2281 (1976) (repealed by Pub. L. No. 94-381, 90 Stat. 1119 (1976)).

300. The Deputy Director testified concerning the Bureau's five-year study of the accident experience of selected motor carriers that use both singles and doubles. The study showed doubles to be safer than singles both in terms of accidents, injuries, and fatalities per 100,000 miles, and in terms of the amount of property damage and number of injuries and fatalities per accident. 434 U.S. at 436.

301. *Id.*

302. *Id.* at 436-37.

303. The state did introduce expert testimony that occupants of smaller vehicles are more likely to be killed in collisions with large trucks than are occupants of larger vehicles. However, the study upon which that testimony was based did not distinguish between 55 foot singles and 65 foot doubles, and the state's expert witness did not have an opinion as to the comparative safety of doubles and singles. *Id.* at 437 n.10.

304. *Id.* at 437.

foot twin trailers have as good a safety record as other large vehicles."[305]

The carriers also produced uncontradicted evidence showing that their operations were disrupted, their costs raised and service slowed as a result of the challenged regulations. Most of the problems arose from having to switch from doubles to singles before entering Wisconsin. For example, Consolidated had to maintain a crew of drivers in Wisconsin whose sole responsibility was to shuttle the second trailer to and from the state line. Finally, the carriers' evidence—again, uncontradicted—demonstrated that Wisconsin routinely permitted the operation of numerous oversized vehicles on its highways.

Despite the one-sided nature of the evidence, the three-judge district court ruled against the carriers.[306] It held that the Wisconsin regulatory scheme neither discriminated against interstate commerce[307] nor burdened it to an extent that outweighed "the benefits to the local popul[ace]."[308] The court was of the opinion that the carriers had not shown that the state's refusal to issue the permits had no relation to highway safety.[309] The added cost to the carriers' operations was considered to be "of no material consequence."[310]

The United States Supreme Court, after noting probable jurisdiction,[311] reversed the three-judge district court, holding that on the record, the Wisconsin regulations violated the commerce clause by placing a substantial burden on interstate commerce without making any more than "the most speculative contribution to highway safety."[312] However, the Court also noted that its holding was "a narrow one," for it did not decide "whether laws of other States restricting the operation of

305. *Id.* at 438 n.12.

306. 417 F. Supp. at 1362-63.

307. *Id.* at 1356-58.

308. *Id.* at 1358.

309. *Id.* at 1359. The court focused on the longer time it took for motorists to pass doubles than singles.

310. *Id.* at 1361.

311. 430 U.S. 914 (1977).

312. 434 U.S. at 447. Raymond and Consolidated had challenged the district court's holding on two grounds. They claimed that: (1) the state's refusal to issue the requested permits burdened interstate commerce in violation of the commerce clause because it substantially interfered with the movement of goods in interstate commerce without making any contribution to highway safety; and (2) the regulation authorizing the issuance of permits for general, industrial interplant, and double-trailer milk trucks discriminated against interstate commerce by allowing permits to be issued to carry the products of Wisconsin industries, but not those of other states, over Wisconsin highways in trucks longer than 55 feet. *Id.* at 439-40. The Court found it necessary to address the second challenge "only as it bears on the first." *Id.* at 440.

trucks over 55 feet long, or of double-trailer trucks, would be upheld if the evidence produced on the safety issue were not so overwhelmingly one-sided as in this case."[313]

Justice Powell began his opinion for the Court[314] by stating the basic principle that even in the absence of a congressional exercise of the commerce clause power, that provision prevents the states "from erecting barriers to the free flow of interstate commerce."[315] Where there is an overlap between " 'national interests' " and " 'activities of legitimate local concern,' " in the absence of congressional guidance the Court is called upon to make " ' "delicate adjustment of the conflicting state and federal claims." ' "[316] Justice Powell observed that in the process of making this delicate adjustment, the Court in the past had employed various tests to express the distinction between permissible and impermissible interference with interstate commerce, but that "experience teaches that no single conceptual approach identifies all of the factors that may bear on a particular case."[317] Justice Powell further observed that all the Court's recent decisions had applied a balancing test. He relied on the Court's opinion in *Pike v. Bruce Church, Inc.*[318] for a statement of the general rule: Where there is a legitimate local public interest and the statute operates in a nondiscriminatory manner to effectuate that interest, the state law will be upheld unless the burden imposed upon interstate commerce is " 'clearly excessive in relation to the putative local benefits.' "[319] The *Pike* Court viewed the inquiry as one of degree, giving consideration to the existence of less restrictive alternatives.[320]

313. *Id.* at 447 (footnote omitted).

314. All members of the Court joined in Justice Powell's opinion with the exception of Justice Stevens, who took no part in the consideration or decision of the case. Justice Blackmun filed a concurring opinion in which Chief Justice Burger and Justices Brennan and Rehnquist joined. *Id.* at 448.

315. *Id.* at 440 (citing Great A & P Tea Co. v. Cottrell, 424 U.S. 366, 370-71 (1976); Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1852)).

316. *Id.* at 440 (quoting Great A & P Tea Co. v. Cottrell, 424 U.S. 366, 371 (1976) (quoting H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 553 (1949) (Black, J., dissenting)). *See also* Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 350 (1977).

317. *Id.* at 440-41 (footnote omitted). *See, e.g.*, H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 552-53 (1949) (Black, J., dissenting); Southern Pacific Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 768-69 (1945); Parker v. Brown, 317 U.S. 341, 362-63 (1943); Di Santo v. Pennsylvania, 273 U.S. 34, 44 (1927) (Stone, J., dissenting).

318. 397 U.S. 137 (1970) (invalidating the Arizona Fruit and Vegetable Standardization Act).

319. 434 U.S. at 441 (quoting 397 U.S. at 142). *See* Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 443 (1960).

320. 397 U.S. at 142, *quoted in* Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 441-42 (1978).

Justice Powell rejected the state's argument that *South Carolina State Highway Department v. Barnwell Brothers*[321] mandated the application of a "rational relation" test.[322] Rather, *Barnwell* was read to require a weighing of state and federal interests.[323] Despite this refusal to follow literally the deferential approach outlined in *Barnwell*, Justice Powell noted that the Court had been reluctant to invalidate legislation in areas where, as in *Barnwell*, the " 'propriety of local regulation has long been recognized.' "[324] Highway safety regulation was identified as an area warranting this strong presumption of validity.[325]

On the facts in *Raymond*, however, such a presumption was overcome. Justice Powell focused on the overwhelming amount of undisputed evidence the carriers had amassed to demonstrate that the regulations did not in fact contribute to highway safety. The state, on the other hand, had "virtually defaulted in its defense of the regulations as a safety measure."[326] Moreover, the carriers had, without contradiction, demonstrated that the Wisconsin laws burdened interstate commerce. In the Court's view, "the burden imposed on interstate commerce by Wisconsin's regulations is no less than that imposed by the statute invalidated in *Bibb*."[327] Finally, the numerous exceptions to the state regulatory scheme either facially discriminated in favor of Wisconsin industries or were enacted at their instance.[328] Such exemp-

321. 303 U.S. 177 (1938) (upheld South Carolina law setting stricter limitations on truck width and weight than did surrounding states' laws).

322. 434 U.S. at 442-43.

323. *Id.* at 443. The *Raymond* Court noted that language in *Barnwell* could, when read in isolation, be interpreted to suggest that absent an element of discrimination against interstate commerce, no showing of a burden on such commerce would suffice to invalidate a local safety regulation. *Id.* However, the Court also noted that in Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959), the *Barnwell* approach to burdens on interstate commerce had been rejected. 434 U.S. at 443. In *Bibb*, the applicable test was formulated as follows: "Unless we can conclude on the whole record that 'the total effect of the law as a safety measure in reducing accidents and casualties is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it' . . . we must uphold the statute." 359 U.S. at 524 (quoting Southern Pacific Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 775-76 (1945)).

324. 434 U.S. at 443 (quoting Pike v. Bruce Church, Inc., 397 U.S. at 143 (quoting Southern Pacific Co. v. Arizona *ex rel.* Sullivan, 325 U.S. at 796 (Douglas, J., dissenting))).

325. *Id.* at 443-44.

326. *Id.* at 444. The Court concluded that "the State's assertion that the challenged regulations contribute to highway safety is rebutted by appellants' evidence and undercut by the maze of exemptions from the general truck-length limit that the State itself allows." *Id.* at 445 (footnote omitted).

327. *Id.* at 445-46 (footnote omitted). *See* Bibb v. Navajo Freight Lines, 359 U.S. 520, 527-28 (1959).

328. 434 U.S. at 446-47. For example, under WIS. STAT. § 348.27(4) (1975), the Commission issued permits to Wisconsin industries and their agent motor carriers to transport goods

tions, the court noted, weakened the presumptive validity of the laws by undermining the assumption that a state's political processes will serve as a check on unduly burdensome regulations.[329]

The significance of *Raymond* lies in the Court's refusal to accord a state highway regulation the degree of deference seemingly mandated by *South Carolina State Highway Department v. Barnwell Brothers.*[330] Although the force of that decision has been limited by subsequent opinions,[331] its rationale has never been repudiated. *Raymond* provides new insights into how the Court will approach challenges to allegedly burdensome state highway regulations, but it does not resolve the problems created by the Court's varying precedents in this area. This conclusion is supported by Justice Blackmun's concurring opinion,[332] in which he emphasized the narrow scope of the majority opinion. He initially stated that the Court's reliance on *Pike v. Bruce Church, Inc.*,[333] did not portend a new approach to the analysis of state highway safety regulations under the commerce clause. Rather, Justice Blackmun noted that even in the case of safety measures, the Court has recognized its responsibility "to weigh the national interest in free-flowing commerce against 'slight or problematical' safety interests."[334]

Justice Blackmun also clearly outlined the limits to the nature of the Court's role in the balancing process. He was careful to distinguish between the factual balance struck in *Raymond* and that established in *Pike*. In the latter case, the state attempted to justify its regulation of the interstate shipment of cantaloupes by claiming an interest "to promote and preserve the reputation of Arizona growers by prohibiting deceptive packaging."[335] In striking down the challenged law, however, the Court determined that this interest, although legitimate, was

in trucks over 55 feet long from Wisconsin plants to the state boundary line and then on to other states. The Commission did not, however, issue permits to industries with plants in other states to transport goods in trucks over 55 feet through Wisconsin to markets in other states. 434 U.S. at 446 n.24.

329. 434 U.S. at 447.

330. *See* South C. St. Highway Dep't v. Barnwell Bros., 303 U.S. 177, 187-92 (1938).

331. *See* Bibb v. Navajo Freight Lines, 359 U.S. 520, 528-29 (1959). *See also* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

332. 434 U.S. 429, 448-51 (Blackmun, J., concurring, joined by Burger, C.J., Brennan & Rehnquist, JJ.). This is a significant opinion, as half of the Justices who took part in the consideration and decision of the case, *see* note 314 *supra*, signed the opinion.

333. 397 U.S. 137 (1970).

334. 434 U.S. at 448 (Blackmun, J., concurring) (quoting Bibb v. Navajo Freight Lines, 359 U.S. 520, 524 (1959) (quoting Southern Pacific Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 776 (1945))).

335. 397 U.S. at 143.

not important enough to justify the substantial burden on commerce.[336] Justice Blackmun explained that neither the *Pike* opinion nor the *Raymond* decision suggested that a similar balance would be struck "when a State legitimately asserts the existence of a safety justification for a regulation."[337] If the safety justifications are not illusory, the Court will not question the legislative judgment by balancing the importance of the safety considerations against the consequent burdens on interstate commerce.[338]

Raymond Motor Transportation, Inc. v. Rice[339] does not mark any radical change in the Court's analysis of questions involving the extent of state power to regulate interstate commerce in the absence of federal action. Justice Powell affirmed that once a legitimate state interest has been identified, the proper approach necessitates a balancing of state and federal interests.[340] Even in the case of highway safety regulations, where there is a presumption of validity, the state must, in the face of evidence to the contrary, carry the burden of substantiating the efficacy of the challenged law as a safety measure. The Court also indicated the state should rebut any suggestion that its political processes are not performing their function as checks on local laws that unreasonably burden interstate commerce; the failure of the state to do so, while not decisive, will clearly weaken any presumption in favor of a regulation's constitutionality.[341]

With respect to the challenging party's role, the Court specifically focused on increased costs as an indication that the regulations impose a burden on interstate commerce.[342] That the regulations substantially increase the cost of the interstate movement of goods is not, as the dis-

336. *Id.* at 145. The statute in question would have required the grower to build and operate an unneeded $200,000 packing plant in the state. *Id.*

337. 434 U.S. at 449 (Blackmun, J., concurring).

338. *Id.* Applying this rule to the factual record developed in *Raymond*, Justice Blackmun observed that the Court had reached its conclusion based on its finding that "the safety interests ha[d] not been shown to exist as a matter of law." *Id.* at 450.

In conclusion, Justice Blackmun stated that the illusory nature of the safety interests in *Raymond* was illustrated not only by the substantial, uncontradicted evidence presented by the carriers, but also by the state's willingness to permit the use of oversized vehicles on its highways. Justice Blackmun viewed the numerous exceptions to the length limits, *see* note 328 and accompanying text *supra*, as an indication that the state in practice did not believe that vehicles such as the 65 foot doubles which the carriers sought to operate presented a threat to highway safety. 434 U.S. at 450-51.

339. 434 U.S. 429 (1978).

340. *See* note 316 and accompanying text *supra*.

341. *See* note 324 and accompanying text *supra*.

342. 434 U.S. at 445-46.

trict court indicated,[343] entirely irrelevant. Although Justice Powell did not regard cost increase as a dispositive factor, he affirmed the view expressed in *Bibb* that, taken into consideration with other factors, cost might be relevant to the issue of whether there was a burden on interstate commerce.[344]

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343. 417 F. Supp. at 1361.
344. 434 U.S. at 445 n.21. *See* Bibb v. Navajo Freight Lines, 359 U.S. 520, 526 (1959).
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